FEDERAL WELFARE REFORM IN LIGHT OF THE CALIFORNIA EXPERIENCE: EARLY LESSONS FOR STATE IMPLEMENTATION OF THE JOBS PROGRAM

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INTRODUCTION

Enactment of the Family Support Act of 1988[1] [hereinafter FSA or the Act] was accompanied by hopes and claims that it established a structure which ensured that recipients of federal cash assistance, through the Aid to Families with Dependent Children [hereinafter AFDC][2] program would also receive the education, training, and support services needed to move from welfare to self-sufficiency.[3] Upon a closer look, it becomes clear that the Act does not provide either the funding or structure to assure education and training

1. Family Support Act of 1988, Pub. L. No. 100-485, 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 2343 (to be codified in scattered sections of 42 U.S.C.) [hereinafter FSA].

2. 42 U.S.C. §§ 601-615 (1982 & Supp. V 1987).

3. Senator Moynihan described the FSA as "an entire redefinition and overhaul of what we have come to know as our welfare system. . . . Receiving income support is no longer to be a permanent or even extended condition but, rather, a transition to employment and an immediate gain of parental support for children." 134 CONG. REC. S13,639 (daily ed. Sept. 29, 1988).

Senator Packwood asserted, "We are going to transform the existing cash assistance — that is, welfare, call it what you want — to a program based on employment and training." *Id.* at S13,647.

Senator Wallop declared:

> The bill reforms the Aid to Families with Dependent Children [program] from top to bottom. . . . We provide a new entitlement program of job training to assist the single parents, usually female, who too often must turn to welfare in order to survive. This new training program will give them the opportunity to move into the mainstream, to become economically self-sufficient.

Id. at S13,654.

opportunities to every family receiving AFDC. The Act provides for limited federal funding and for tremendous state discretion in shaping state work-related programs.[4] As a result, state programs may vary dramatically in the availability and nature of services. Some programs may emphasize opportunity and choice while others will emphasize mandates and compulsion. While all states will be constrained by the limited federal funding,[5] broad state discretion will result in an array of fundamentally different state efforts within the scope of the Family Support Act.

There is reason to believe that a state that carefully analyzes its options under the legislation and implements a thoughtful program can make genuine if modest gains in improving the employability and earnings of AFDC recipient families. On the other hand, a state which prefers to utilize the provisions of the Act to impose punitive requirements on recipients is also free to do so. A state which operates with no long-range strategy, but merely seeks to identify the easiest and cheapest way to comply with federal law, is far more likely to end up with a punitive rather than constructive result.

One possible direction for a state implementing the FSA is suggested by California's Greater Avenues to Independence [hereinafter GAIN] program.[6] GAIN involves a combination of work, education, and training activities for California's AFDC population.[7] The program has sought to operate as an "enriched" mandatory program: one which broadly compels recipient participation, but also expends significant funds for education. GAIN's early experience suggests the limits of this strategy and indicates a number of other issues likely to arise in the development of state programs. In particular, under the FSA states must choose between broader participation or higher quality services. This choice will have a critical effect in determining whether recipients truly have access to "education and training."

This Article discusses the breadth of state discretion in implementing the work, education, and training provisions of the FSA and, based on California's experience with GAIN, suggests some steps states can take to avail themselves of some of the FSA's opportunities while avoiding its most serious potential pitfalls. Part I offers a brief overview of the AFDC program. It focuses on how AFDC's treatment of working recipients and the declining federal commitment to employment, education, and training programs during the Reagan years helped create a climate which led to the enactment of the FSA. Part II explores in detail the central features of the Job Opportunities and Basic Skills Training [hereinafter JOBS] program, which is the employment, education, and training component of the FSA.[8] Part III briefly de-

4. *See infra* text accompanying notes 60-107.

5. *See infra* text accompanying notes 127-44.

6. CAL. WELF. & INST. CODE § 11320 (Deering 1985).

7. *See infra* text accompanying notes 111-27.

8. Accordingly, this Article does not offer a comprehensive overview of all aspects of the Family Support Act. Most notably, the Act contains major amendments to the child support enforcement structure, which are not discussed herein. For an overview of those amendments,

scribes the main elements of California's GAIN program — as the program was structured before FSA implementation — and draws lessons from GAIN's early experiences to discuss some critical issues in JOBS' implementation.

I.
THE AFDC PROGRAM

A. Purpose, Prerequisites, Benefit Levels, and Procedural Complexity

AFDC is the basic federally-assisted cash program for families with dependent children,[9] providing aid to approximately 3.8 million families and 11 million recipients in 1987.[10] Every state operates an AFDC program.[11]

To receive AFDC, a family must include a "dependent child."[12] A dependent child is one who is deprived of parental support or care within the meaning of the statute,[13] who lives in the home of one of the relatives specified by federal law,[14] who meets program age requirements,[15] and who is "needy."

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see STAFF OF HOUSE COMM. ON WAYS AND MEANS, 101ST CONG., 1ST SESS., GENERAL EXPLANATION OF THE FAMILY SUPPORT ACT OF 1988, at 101-03 (Comm. Print 1989); P. ROBERTS, TURNING PROMISES INTO REALITIES: A GUIDE TO IMPLEMENTING THE CHILD SUPPORT PROVISIONS OF THE FAMILY SUPPORT ACT OF 1988 (1988) (available from Center for Law & Social Policy); Harris, *Child Support for Welfare Families: Family Policy Trapped in Its Own Rhetoric*, 16 N.Y.U. REV. L. & SOC. CHANGE 619 (1987-1988).

9. The federal government pays 50% or more of the cost of AFDC benefits and, in most instances, pays 50% of a state's administrative expenses for program operation. 42 U.S.C. § 603 (1982 & Supp. V 1987); STAFF OF SENATE COMM. ON FINANCE, 100TH CONG., 2D SESS., DATA AND MATERIALS RELATED TO WELFARE PROGRAMS FOR FAMILIES WITH CHILDREN 25-27 (table A-11) (Comm. Print 1988) [hereinafter DATA AND MATERIALS].

10. DATA AND MATERIALS, *supra* note 9, at 20 (table A-7).

11. For an overview of the similarities and differences in the states' AFDC plans, see U.S. DEP'T OF HEALTH & HUMAN SERVICES, CHARACTERISTICS OF STATE PLANS FOR AID TO FAMILIES WITH DEPENDENT CHILDREN (1987) [hereinafter CHARACTERISTICS OF STATE PLANS].

12. 42 U.S.C. § 606(a) (1982 & Supp. V 1987). AFDC may be paid despite the absence of a dependent child, in limited instances. *See* 45 C.F.R. § 233.90(c)(2)(iv) (1989).

13. A child meets the requirement of "deprivation" if she is deprived of parental support or care by reason of the death, continued absence from the home, or mental or physical incapacity of a parent. 42 U.S.C. § 606(a) (1982 & Supp. V 1987); 45 C.F.R. § 233.90(c)(1) (1989). When the AFDC program was initially enacted, it did not provide for assistance to two-parent families unless one parent was incapacitated. Since 1961, federal law has permitted states to expand the definition of dependent child to include a child deprived of parental support based on the unemployment of a parent. 42 U.S.C. § 607 (1982 & Supp. V 1987); 45 C.F.R. § 233.100 (1989). In fiscal year 1987, twenty-six states, Guam, and the District of Columbia exercised this option. DATA AND MATERIALS, *supra* note 9, at 22-23 (table A-9). Nationwide, 6.2% of AFDC families received AFDC benefits on the basis of the unemployment of a parent. U.S. DEP'T OF HEALTH & HUMAN SERVICES, CHARACTERISTICS AND FINANCIAL CIRCUMSTANCES OF AFDC RECIPIENTS 9 (1986) [hereinafter CHARACTERISTICS AND FINANCIAL CIRCUMSTANCES]. An FSA requirement that states not currently providing AFDC assistance on the basis of unemployment do so under certain limited circumstances is discussed *infra* text accompanying note 58.

14. The permissible relatives are specified in 42 U.S.C. § 606(a) (1982 & Supp. V 1987) and 45 C.F.R. § 233.90(c)(1)(v) (1989). If a child is not living with one of the specified relatives, the child is ineligible for assistance unless the child meets the special requirements of the

A needy child is one whose AFDC assistance "unit"[16] meets financial standards for assistance. Each state sets its own standard of need and its own AFDC payment standard.[17] The payment standard (*i.e.*, the actual amount paid to a family with no other income) may be set at or lower than the standard of need. In January 1988, the median state need standard for a family of three was $434 per month, and the median payment level for a family of three with no countable income was $359 per month.[18] In the median state, therefore, a family with monthly countable income exceeding $434 was ineligible for aid. If the state used the most common budget methodology,[19] a family with monthly countable income exceeding $359 was also ineligible for aid, and a family with, for example, countable income of $300 received $59 in AFDC benefits each month.

Because states have unrestricted discretion in setting their AFDC benefit levels, the actual benefit amounts vary considerably from state to state. In January 1988, Alaska provided $799 per month to a family of three with no other income, while Alabama provided the same family $118 per month in AFDC benefits.[20] Benefits were less than $400 per month in thirty-two states.[21]

Gaining access to AFDC and retaining assistance is sometimes difficult because of the program's procedural complexity. States have broad discretion to impose verification requirements on applicants and recipients.[22] Most denials of assistance and a substantial number of program terminations result not from an applicant's or recipient's substantive ineligibility, but from her failure

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AFDC foster care program. 42 U.S.C. §§ 670-679 (1982 & Supp. V 1987); 45 C.F.R. § 233.110 (1989).

15. The child must be under 18 or, at the state's option, under 19 if the child is also a full-time student in a secondary school or in the equivalent level of vocational or technical training and if the student is reasonably expected to complete the program before the age of 19. 42 U.S.C. § 606(a)(2) (1982 & Supp. V 1987).

16. When AFDC is sought for a child, financial eligibility is determined based on the income and resources of an AFDC "filing unit" which must contain the child's parent(s) in the home and any siblings of the child in the home that meet federal standards for being dependent children. 42 U.S.C. § 602(a)(38) (1982 & Supp. V 1987); 45 C.F.R. § 206.10(a)(1)(vii) (1989).

17. 45 C.F.R. § 233.20(a)(2) (1989). In addition to these income standards, an assistance unit's countable resources may not exceed $1,000 or such lower amount as the state may set. 42 U.S.C. § 602(a)(7)(B) (1982 & Supp. V 1987); 45 C.F.R. § 233.20(a)(3)(i)(B) (1989). All assets are counted unless excluded by law. 45 C.F.R. § 233.20(a)(3)(i)(B) (1989).

18. DATA AND MATERIALS, *supra* note 9, at 10 (table A-1). In most states, the payment level is lower than the standard of need. *Id.* Federal law required states to make cost-of-living adjustments in their need standards by July 1, 1969. Since then, there has been no additional federal requirement that states update either their payment levels or standards of need. *See* Rosado v. Wyman, 397 U.S. 397 (1970). The FSA's treatment of the standard of need is discussed *infra* note 56 and accompanying text.

19. The most common budget methodology is to pay the difference between a family's countable income and the payment standard. CHARACTERISTICS OF STATE PLANS, *supra* note 11, at 401.

20. DATA AND MATERIALS, *supra* note 9, at 19 (table A-5).

21. *Id.*

22. *See* 45 C.F.R. § 233.10(a)(1)(ii)(B) (1989).

to comply with procedural requirements.[23]

B. AFDC's Treatment of Work and Earnings

There are two components of the AFDC's treatment of work for recipients: earned income budgeting rules, and the operation of state and federal programs to provide education, training, or work-related activities for AFDC recipients.

1. AFDC's Treatment of Earned Income

Program budgeting rules represent one means which could affect employment rates of AFDC recipients. These rules govern the relationship between recipient earnings, AFDC eligibility, and grant levels. More liberal treatment of earned income would make it possible for a recipient to take a job without losing all or most of her benefits.[24] Legislative changes in 1981, however, made it substantially more difficult for a family with a working member to receive AFDC assistance.[25]

A family's AFDC grant depends on its countable income. Until 1981, a recipient's countable income was determined by deducting from gross income all expenses, including the cost of child care, reasonably related to the earning of that income. Recipients also received a "$30 and one-third deduction," subtracting the first $30 and one-third of the rest of the family's earnings from gross income. Effective "taxation" of earned income was quite severe under this formula, but the ability to deduct $30 and one-third of income in addition to work expenses ensured that employment did not result in a dollar-for-dollar

23. Sixty-two percent of the AFDC application denials were for failure to comply with procedural requirements in the July-September 1986 quarter. State reports of participant terminations do not distinguish between instances where a family voluntarily withdraws from assistance and instances where a family fails to comply with a procedural requirement; both are recorded under the category of "Family Request or Initiative." In the July-September 1986 reporting period, 48.9% of the AFDC terminations were based on "Family Request or Initiative." *See* U.S. DEP'T OF HEALTH & HUMAN SERVICES, QUARTERLY PUBLIC ASSISTANCE STATISTICS 94, 96 (1986).

For a discussion of the causes and effects of procedural terminations of public assistance, see Dehavenon, *Charles Dickens Meets Franz Kafka: The Maladministration of New York City's Public Assistance Program*, 17 N.Y.U. REV. L. & SOC. CHANGE 231 (1989-1990).

24. Considerable controversy exists over the extent to which disregarding earnings when determining AFDC eligibility and benefit levels actually affects work behavior. It is sometimes suggested that program rules which allow a person to keep more money earned through employment would encourage more work. But empirical research from samples of AFDC recipients before and after program changes suggests that recipients generally continued their work levels despite an increased effective taxation on earnings. *See* Moffit, *Work Incentives in the AFDC System: An Analysis of the 1981 Reforms*, 76 AM. ECON. REV. 219, 219-23 (1986). *But see infra* text accompanying notes 31-33. While not typically discussed in the literature, the continued employment despite higher effective taxation rates might occur because AFDC recipients living at the margins of subsistence do not have the luxury of declining employment. Whatever the actual effect on behavior, lower effective taxation rates on earnings would clearly diminish the punitive effect of tax rates on AFDC recipients who work, and thereby make working poor families less poor.

25. *See infra* text accompanying notes 27-33.

loss in benefits.[26]

The Omnibus Budget Reconciliation Act of 1981 [hereinafter OBRA][27] substantially curtailed AFDC earned income "disregards." Of greatest importance, OBRA eliminated the $30 and one-third deduction after the first four months of employment.[28] Further, instead of permitting deductions for actual child care expenses, OBRA limited families to a maximum deduction of $160 per child for full-time workers and a smaller amount for part-time workers.[29] Instead of allowing deductions for all actual work-related expenses, OBRA limited families to a $75 standard deduction, regardless of actual expenses.[30]

The reductions in earned income disregards, combined with other provisions directed against working recipients,[31] made it difficult, if not impossible, for persons in wage-earning, low-income families to retain their eligibility for

26. 42 U.S.C. § 602(a)(8)(A)(iv) (1976 & Supp. V 1981) (amended 1981). To illustrate, assume a parent grossed $630 per month in 1980 and had $200 in child care expenses and $100 in other work-related expenses. First, the state would subtract $30 from $630, and one-third of the remainder, leaving $400. Then, deductions for child care and other work-related expenses would be allowed. The remainder, $100, would be the family's countable earned income and would lead in most states to a $100 reduction in the AFDC grant. Note that in this instance, even after work-related expenses were considered, the family had a net gain from going to work of $330. The AFDC grant was reduced by $100 based on this net gain, *i.e.*, the family effectively lost almost thirty percent of the $330 through reduced AFDC benefits.

27. Pub. L. No. 97-35, tit. XXIII, §§ 2301, 2306, 95 Stat. 357, 843-46 (1981) (codified in scattered sections of 42 U.S.C.) [hereinafter OBRA].

28. After four months, a family is ineligible for the $30 and one-third deduction until 12 consecutive months have passed in which the family has not received AFDC benefits. 42 U.S.C. § 602(a)(8)(A)(iv), (B)(ii)(II) (1976 & Supp. V 1981); 45 C.F.R. § 233.20(a)(11)(i)(D), (ii)(B) (1989). The legislation also reduced the value of the $30 and one-third deduction by providing that it would be calculated only after all other deductions had been subtracted from the family's gross income.

Congress slightly reduced the impact of this provision in the Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 2623, 98 Stat. 697, 1134 (codified at 42 U.S.C. § 602(a) (Supp. V 1987)). Though the one-third deduction still expires after four months, the $30 deduction now continues for eight additional months. 45 C.F.R. § 233.20(a)(11)(ii)(B) (1989).

29. OBRA § 2301, 95 Stat. 357, 843 (codified at 42 U.S.C. § 602(a)(8)(A)(iii) (Supp. V 1981)); 45 C.F.R. § 233.20(a)(11)(i)(C) (1989). The effect of the FSA on this provision is discussed *infra* note 57.

30. OBRA § 2301, 95 Stat. 357, 843 (codified at 42 U.S.C. § 602(a)(8)(A)(ii) (Supp. V 1981)); 45 C.F.R. § 233.20(a)(11)(i)(B) (1989). The effect of the FSA on this provision is discussed *infra* note 57.

31. Several other provisions of OBRA were also expressly directed at restricting the eligibility or benefits of working recipients. States were required to deny recipients the benefit of the earned income disregards in a number of circumstances. OBRA § 2301, 95 Stat. 357, 843-44 (codified at 42 U.S.C. § 602(a)(8)(B) (Supp. V 1981)). States were required to deny assistance, regardless of a family's countable income, if the family's gross income exceeded 150% of the state's standard of need. OBRA § 2303, 95 Stat. 357, 845 (codified at 42 U.S.C. § 602(a)(18) (Supp. V 1981)). States were required to treat any earned income tax credit as income and to assume that the family received the credit if eligible, even if the family did not in fact receive it. OBRA § 2305, 95 Stat. 357, 845-46 (codified at 42 U.S.C. § 602(d)(1) (Supp. V 1981)).

The provisions relating to the standard of need and to earned income tax credits were softened in the Deficit Reduction Act of 1984, Pub. L. No. 98-369, §§ 2621, 2629, 98 Stat. 697, 1134, 1137 (codified at 42 U.S.C. § 602 (Supp. V 1987)) (respectively, replacing the 150% cap with a 185% cap, and providing that the earned income tax credit would be treated as income only if actually received).

AFDC.[32] As a result, the percentage of AFDC mothers working full- or part-time dropped by almost two-thirds, from 14.1% in March 1979 to 4.9% in August 1983.[33] This reduction in working families on AFDC did not occur because family members stopped working. It occurred because the altered budgeting rules made poor working families ineligible for aid.

2. *Work, Education, and Training Programs*

The ability of AFDC recipients to obtain employment is affected not only by changes in program budgeting rules, but also by changes in the focus of, and federal budgetary commitment to, work, education, and training programs. Curtailment of the federal funding commitment to such programs during the Reagan Administration virtually eliminated education and training efforts in a number of states.

Congress, in 1968, enacted the Work Incentive [hereinafter WIN] program.[34] WIN sought to create "incentives, opportunities, and necessary services" for the employment of AFDC recipients in the regular economy, the training of such individuals for work in the regular economy, and the participation of such individuals in special work projects, "thus restoring the families of such individuals to independence and useful roles in their communities."[35]

At the federal level, the Department of Labor and the Department of Health, Education, and Welfare (the predecessor of the present Department of Health and Human Services [hereinafter HHS]) jointly administered WIN. Virtually every state divided responsibility for administering the program between its employment service and a distinct administrative unit within its welfare department. In WIN's first years of operation, the program emphasized the provision of institutional training to improve recipients' occupational skills.

In 1971, Congress enacted the Talmadge Amendments,[36] which redirected WIN's focus to the immediate employment of AFDC recipients when-

32. For example, consider the family described *supra* note 26. In most states, this family would become totally ineligible for aid within four months.

In the first four months, the family would get the maximum child care ($160) and work expense ($75) deductions, leaving net income of $395. The family would then get a $30 and one-third deduction, with a resulting countable income of $243, as opposed to $100 under prior law. The AFDC grant would be reduced by the additional $143. But after the first four months, the one-third deduction would expire, and the family's countable income would be $365. In most states, countable income of $365 would make a family ineligible for aid. *See supra* text accompanying notes 17-19.

33. DATA AND MATERIALS, *supra* note 9, at 29 (table A-13). By August 1986, the percentage had increased to 5.8%. *Id.*

34. Pub. L. No. 90-248, 81 Stat. 821, 884 (1968) (codified at 42 U.S.C. §§ 630-716 (Supp. V 1969)).

35. 42 U.S.C. § 630 (Supp. V 1969). For a discussion of welfare-employment activities prior to WIN, see D. NIGHTINGALE & L. BURBRIDGE, THE STATUS OF STATE WORK-WELFARE PROGRAMS IN 1986: IMPLICATIONS FOR WELFARE REFORM 8-13 (1987) (available from Urban Institute) [hereinafter STATE WORK-WELFARE PROGRAMS].

36. Pub. L. No. 92-223, 85 Stat. 803 (1971).

ever possible. The 1971 legislation mandated registration for a number of categories of AFDC recipients. As part of the shift in emphasis to immediate placement, the Talmadge Amendments mandated that at least one-third of the program's funds be spent for on-the-job training and public service employment.[37]

During the 1970s, state WIN operations provided a mixture of job counseling, placement, and training; employability planning; job search instruction; and other supportive services.[38] In fiscal year 1981, WIN registered over 1,000,000 new participants; 310,000 WIN participants entered unsubsidized employment; and 169,000 left AFDC because of employment. The six-month employment retention rate was 61.5%.[39] It would be misleading to credit the WIN program with all, or even most, of the employment activities of its registrants. Many of the registrants received only limited services, and many would have obtained employment without WIN. Indeed, a survey by the General Accounting Office [hereinafter GAO] in 1980 concluded that about 70% of those who entered employment while registered with WIN found their own jobs.

The Reagan Administration initiated two major changes in WIN: much greater state flexibility and much less federal funding.[40] OBRA authorized WIN demonstration programs,[41] which let states consolidate their WIN pro-

37. STATE WORK-WELFARE PROGRAMS, *supra* note 35, at 14-18; *see also* U.S. DEP'T OF LABOR, IMPLEMENTING WELFARE-EMPLOYMENT PROGRAMS: AN INSTITUTIONAL ANALYSIS OF THE WORK INCENTIVE (WIN) PROGRAM 6 (1980) [hereinafter IMPLEMENTING WELFARE-EMPLOYMENT PROGRAMS].

38. IMPLEMENTING WELFARE-EMPLOYMENT PROGRAMS, *supra* note 37, at 6.

39. STAFF OF HOUSE COMM. ON WAYS AND MEANS, 99TH CONG., 2D SESS., BACKGROUND MATERIAL AND DATA ON PROGRAMS WITHIN THE JURISDICTION OF THE COMMITTEE ON WAYS AND MEANS 358 (Comm. Print 1986). GEN. ACCOUNTING OFFICE, AN OVERVIEW OF THE WIN PROGRAM: ITS OBJECTIVES, ACCOMPLISHMENTS, AND PROBLEMS 16 (1982). Despite the GAO's criticism of an approach to program accomplishments that claims credit for every person who gets a job, a number of state agencies continue to use this method.

40. The following passage from a report of the Senate Finance Committee illustrates the standard criticisms of WIN that motivated these changes:

> When it was enacted twenty years ago, WIN offered generous open-ended entitlement funding for child care, and a wide array of education, employment, and training programs. The experts estimated that these programs would help large numbers of welfare recipients out of dependency.
>
> Unfortunately, WIN never lived up to its promise. It was enacted at a time when the value of employment and training programs was seriously questioned. It had an administrative structure that was complex and lacked accountability. And neither the Administration, the Congress, nor the Governors and State legislators were fully supportive of it. Lacking broad support, it has been whittled away year by year, demoralizing recipients and administrators alike.

SENATE COMM. ON FINANCE, REPORT ON THE FAMILY SUPPORT ACT OF 1988, S. REP. NO. 377, 100th Cong., 2d Sess. 7-8 (1988) [hereinafter FINANCE COMMITTEE REPORT].

41. OBRA § 2309, 95 Stat. 357, 850-52 (codified at 42 U.S.C. § 645 (Supp. V 1981)). The Act also authorized two other forms of work-related programs: Community Work Experience programs, in which recipients would be required to work without pay as a condition of continuing AFDC benefits, OBRA § 2307, 95 Stat. 357, 846-48 (codified at 42 U.S.C. § 609 (Supp. V 1981)), and Work Supplementation programs, in which a participant's welfare grant could be

grams under a single state agency, leaving each state "free to design a program which best addresses its individual needs, makes best use of its available resources, and recognizes its labor market conditions."[42] At the same time, program funding dropped precipitously. The federal appropriation declined from $365 million in fiscal year 1980 to $93 million in fiscal year 1988.[43]

Thus, the 1980s saw two simultaneous developments. On the one hand, most states made use of the WIN demonstration opportunity to redesign their WIN programs under the sole jurisdiction of their respective welfare agencies.[44] On the other hand, states were forced to operate with steadily declining federal funds. These two trends often resulted in programs which were considerably more impressive in their public relations brochures than in actual operation. An examination of the WIN demonstrations by the GAO revealed that: "although on paper at least seventy percent of WIN Demonstrations offer intensive services (such as on-the-job training, remedial education, and postsecondary education), in practice most participants engage in activities that send them directly into the job market without skill or work habit enhancement."[45]

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used to subsidize a job provided by a public or private non-profit entity, OBRA § 2308, 95 Stat. 357, 849 (codified at 42 U.S.C. § 602(c) (Supp. V 1981)). The Work Supplementation provisions were subsequently amended to include for-profit private entities among permissible employers. Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 2638, 98 Stat. 697, 1143 (codified at 42 U.S.C. § 614(c)(3) (Supp. V 1987)). The year after enactment of OBRA, Congress added new authority for states to establish mandatory job search programs for AFDC applicants and recipients. Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 2154, 96 Stat. 397.

42. 42 U.S.C. § 645(c) (Supp. V 1981).

43. DATA AND MATERIALS, *supra* note 9, at 143-44.

44. For an overview of four different types of WIN demonstration programs, see GEN. ACCOUNTING OFFICE, WORK AND WELFARE: ANALYSIS OF AFDC EMPLOYMENT PROGRAMS IN FOUR STATES (1988). For an overview of several of the more innovative state programs, see Roberts & Schulzinger, *Welfare Reform in the States: Fact or Fiction?* (pts. 1 & 2), 21 CLEARINGHOUSE REV. 695 (1987), 21 CLEARINGHOUSE REV. 1032 (1988).

45. GEN. ACCOUNTING OFFICE, WORK AND WELFARE: CURRENT AFDC WORK PROGRAMS AND IMPLICATIONS FOR FEDERAL POLICY 69 (1987). The GAO found that in instances where data was available concerning program activities of WIN demonstration participants in fiscal year 1985, 52.6% received individual job search assistance, 52.4% received group job search assistance, 3.2% received remedial or basic education, 2.3% received vocational skills training, 1.6% received post-high school education, 3.3% received other education and training services, and 4.5% received work experience. *Id.* at 69-70.

A survey of state work-welfare programs in 1986 concluded that 11 states stood out as having comprehensive programs, considering services, geographic coverage, and state financial commitment. Four other states had comprehensive program models available but with considerable county-by-county variation. Seven states seemed to have programs offering only minimal services and coverage. The remaining 28 states fell between the extremes. Most states offered programs which they described as emphasizing job search or mandatory work without pay, with some additional services and components available to some clients or in some local areas. STATE WORK-WELFARE PROGRAMS, *supra* note 35, at 111-13.

This summary comparison of states may lead to an unduly optimistic impression. While it is true that some states did more than others, the fact that a program existed in a county demonstrates neither the likelihood that a recipient had access to the program nor the choices available to a recipient required or permitted to participate. But since there were virtually no federal reporting requirements in recent years, and since each state was free to use its own

In sum, by 1988, federal legislation had made it difficult for individuals to receive AFDC while employed and had vastly reduced the federal commitment to the education and training of AFDC recipients. These changes formed the backdrop from which Congress sought to examine ways to reduce barriers to greater employment for AFDC recipients.

II.
ENACTMENT OF THE JOBS PROGRAM AND RELATED PROVISIONS

Several converging factors led to the enactment of the JOBS program as part of the FSA. States seeking to operate their welfare-work initiatives were increasingly frustrated by the lack of a stable federal funding structure for state programs.[46] The federal legislative amendments and appropriation reductions of the early 1980s were additional factors in the perceived need for legislation. As noted above,[47] those changes made it difficult for a family to work and receive AFDC. They also made it difficult for many AFDC families to receive any work or training-related assistance. Congress, in turn, became aware that fewer AFDC recipients were working or participating in training programs than had previously done so.[48]

The changing needs of the business community constituted a third major concern prompting a demand for welfare-reform legislation. Based on the nation's shifting demography, the number of entry-level workers had begun to decline, and the decline was projected to continue in the coming years.[49] This

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methods for maintaining program data, comparing state programs is difficult. Nightingale and Burbridge, authors of the Urban Institute's report, found that very few states were able to respond fully to their requests for statistical data and that there was little consistency in data and definitions across programs and states. *Id.* at 5-6.

46. *See, e.g., Welfare Reform: Hearings Before the Senate Comm. on Finance*, 100th Cong., 1st Sess., pt. 1, at 16-25 (1987) [hereinafter *Welfare Reform Hearings*]; *id.*, pt. 2, at 29-34, 169-75 (statement of Bill Clinton, Governor of Arkansas); *see also id.*, pt. 1, at 26-38 (statement of Michael Castle, Governor of Delaware); *id.*, pt. 2, at 56-60, 219-31 (statement of Stephen Heintz, Commissioner, Connecticut Dep't of Income Maintenance, on behalf of the American Public Welfare Ass'n). Both the governors and the welfare administrators were actively involved in addressing all of the major issues concerning the contents of the legislation.

47. *See supra* text accompanying notes 27-43.

48. In congressional hearings, Senator Moynihan asked:

> Here are the numbers, and I want to ask you to tell me what you think happened: In 1969, 15 percent of the AFDC mothers were employed full- or part-time — not a large portion, but probably not drastically away from the experience of mothers, of women generally. We go by 15 years, and we are at 1984, and that number has dropped to under 5 percent — it has gone down in the face of a great deal of talk.

Welfare Reform Hearings, supra note 46, pt. 1, at 33.

49. Pierce Quinlan, Executive Vice-President of the National Alliance for Business, explained:

> Our information seems to indicate that we are going to have significant shortfalls, certainly between now and 1995, on entry-level workers. The demographics are very clear on that. We have seen that already last summer on both of our coasts where we have had a significant shortage of entry-level workers for summer jobs.

Id., pt. 3, at 16. In testimony submitted to the Committee, he expanded on this point:

trend suggested a need for expanded training and support services for entry-level workers.

New concern about lengths of stays on AFDC was a fourth factor leading to enactment of the legislation. For some time, there had been a general awareness that the average stay on AFDC was less than two years. But longitudinal studies suggested that, at least for a portion of the AFDC population, longitudinal receipt was far longer.[50] This evidence of longitudinal receipt contributed to the notion that the AFDC population was in need of some kind of intervention.[51]

In response to these concerns, Congress enacted the work, education, and training provisions of the FSA[52] and, most notably, the JOBS title of the Act.[53] This section describes the essential features of the FSA that relate to

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> Traditionally, welfare reform has not been an important business issue. However, the interest and involvement of private sector employers in human resource issues has increased substantially in recent years, as the growing skill requirements of most jobs have outpaced the abilities of available workers. Many employers are worried that, unless a concerted effort is made to increase the education and skills of the nation's workforce, productivity could be impaired and economic growth could be undermined.
>
> . . . .
>
> The rekindling of the welfare debate also coincides with the longest peacetime economic expansion since World War II, which has led to acute shortages of entry-level workers in some regions of the country. Demographic trends suggest that such shortages could become commonplace, restricting the ability of employers to fill job vacancies. To assure an adequate supply of labor, the nation will need to develop the productive capacity of groups previously considered to be outside the mainstream of our economy. In sum, training welfare recipients to fill job vacancies in the private sector is not only good social policy, but sound economic policy.

Id., pt. 3, at 158-59. Senator Moynihan added that by the year 2000, the population aged 18 to 24 (i.e. entry-level workers) is projected to decline by 23%. *Id.*, pt. 3, at 18.

50. In D. ELLWOOD & M. BANE, THE DYNAMICS OF DEPENDENCE: THE ROUTES TO SELF-SUFFICIENCY (1983) (available from Urban Systems Research & Engineering), the authors examined the duration of welfare dynamics and concluded that while 50% of the spells of AFDC receipt end within two years, 15% last more than eight years. In a follow-up examination of the data, Ellwood focused on the number of persons ending one spell of AFDC receipt who received AFDC on one or more subsequent occasions. He concluded that 42% of persons who leave AFDC for at least one year return. Taking into consideration people who return to AFDC, he concluded that 50% of those who receive AFDC will do so for less than four years. But nearly 25% will receive AFDC for 10 or more years. He found the average total period of AFDC receipt to be nearly seven years. D. ELLWOOD, TARGETING "WOULD-BE" LONG TERM RECIPIENTS OF AFDC 12, 25 (1986) (available from Mathematica Policy Research, Inc.).

51. There are, of course, two ways to look at longitudinal data: either as evidence that a number of poor people will remain poor absent some assistance or as evidence that there exists a culture of "welfare dependency." Unfortunately, much of the reaction to the longitudinal studies reflected a view that long-term welfare receipt itself was the problem, rather than simply evidence that a number of poor people remained poor over time.

52. Pub. L. No. 100-485, 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 2343 (to be codified in scattered sections of 42 U.S.C.).

53. *Id.* §§ 201-04, 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) at 2356-81 (to be codified in scattered sections of 42 U.S.C.).

work, education, and training for AFDC recipients, focusing on the JOBS program.[54]

A. The FSA's Treatment of Earnings and Benefits

The FSA makes no improvements in AFDC benefit levels.[55] The Act makes only modest adjustments in earnings disregards[56] but does not otherwise alter the budgeting process for recipients with earnings. Accordingly, it remains difficult or impossible for working poor families to receive AFDC in many states.

The FSA does provide a partial expansion of eligibility for two-parent families receiving AFDC on the basis of the unemployment of a parent. Effective October 1, 1990, all states must have an AFDC Unemployed Parent [hereinafter AFDC-UP] program for children in two-parent families satisfying federal requirements. States initiating a program, however, may limit eligibility to six months in each twelve-month period and may impose a number of other restrictive features.[57]

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54. The JOBS program is Title II of the Act. Title I contains a number of child support enforcement amendments. *See supra* note 8. Title III contains a set of related amendments concerning the provision of child care and medical assistance during and after JOBS participation and under certain other circumstances. Title IV contains miscellaneous AFDC amendments not directly related to JOBS.

Implementing federal regulations covering most aspects of the JOBS program were published October 13, 1989. *See* 54 Fed. Reg. 42,146-267 (1989) (to be codified at 45 C.F.R. pts. 250-56). Joint regulations by the Departments of Health and Human Services, and Labor, relating to certain participant and worker protections in the JOBS program, have not yet been issued as final regulations. Proposed implementing regulations were published at 54 Fed. Reg. 15,638-95 (1989) (proposed codification in scattered sections of 45 C.F.R.) (proposed Apr. 18, 1989) and 54 Fed. Reg. 15,902-06 (1989) (proposed codification at 45 C.F.R. § 251) (proposed Apr. 19, 1989). For a detailed analysis of the proposed regulations, see M. GREENBERG, COMMENTS ON THE PROPOSED REGULATIONS TO IMPLEMENT THE JOBS PROGRAM (1989) (available from Center for Law & Social Policy). For an analysis of changes resulting from the final regulations, see M. GREENBERG, THE JOBS REGULATIONS: IMPLICATIONS FOR STATES AND RECIPIENTS (1989) (available from Center for Law & Social Policy).

55. Instead, the Act provides that each state must submit a report every three years which will "reevaluate" the state's payment level and standard of need. FSA § 404(a), 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 2343, 2398 (to be codified at 42 U.S.C. § 602(h)) (effective Oct. 13, 1988). It appears that a state need not take any action based on its reevaluation.

The Conferees dropped a House provision that would have provided enhanced federal matching funds for benefit increases over a three-year period. *See* H.R. REP. No. 998, 100th Cong., 2d Sess. 183-84 (1988).

56. The Act increases the AFDC standard work expense deduction from $75 to $90 and increases the child care disregards from $160 to $175 for children two and over and to $200 for children under two. The Act also changes the order in which disregards are taken so that the child care disregard is applied last. FSA § 402(a), 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 2343, 2397 (to be codified at 42 U.S.C. § 602(a)(8)(A)(iii)) (effective Oct. 1, 1989).

57. *Id.* § 401, 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) at 2393-97 (to be codified in scattered sections of 42 U.S.C.) (effective Oct. 1, 1990). States may, except as mandated by other provisions of the JOBS program, require AFDC-UP parents to participate in JOBS programs up to 40 hours per week. *Id.* § 401(b)(1)(C), 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) at 2395 (to be codified at 42 U.S.C. § 607(b)(2)(C)(i)) (effective Oct. 1, 1990). States may provide for payment of AFDC benefits for AFDC-UP families up to one

B. The JOBS Program

The FSA's central education and training provision requires that each state initiate a JOBS program,[58] which will replace the WIN program. JOBS is typically described as a program in which individuals will receive an assessment of their skills, needs, and interests and will then participate in a program component. The program component could involve a broad range of education, training, job readiness, or work-related activities. States must guarantee child care and other needed supportive services for JOBS participants. For participants who obtain employment, a year of transitional child care assistance and medical care coverage is guaranteed.

On closer examination, states have far more flexibility in implementing JOBS than might be assumed from the basic description. State discretion appears in each major feature of the program. While expanding the potential non-exempt population, JOBS has also given the states enormous discretion in deciding who actually participates in the state programs. The authorized programs include a broad range of education, employment, training, job search, and unpaid work components. The JOBS title, however, does not dictate the content of the programs and gives states substantial discretion to decide which services a participant will receive. States also have discretion in the nature and extent of child care and other supportive services that a participant can receive. Finally, JOBS contains a funding structure that allows states to determine the level at which they will operate their programs, subject to caps which limit their ability to draw down federal funds for more comprehensive programs.[59]

When each of these factors is taken into account, JOBS is best characterized as creating a federal funding stream for a wide range of state programs. A state JOBS program may or may not have a substantial education and training component, may or may not be available to much of the AFDC population, and may or may not assure participants access to child care and supportive services. In short, JOBS does not transform AFDC into a program based on education and training; rather, it allows states to provide a limited

month after the performance of assigned program activities. *Id.* (to be codified at 42 U.S.C. § 601(b)(2)(C)(ii)) (effective Oct. 1, 1990).

58. *Id.* § 201(b), 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) at 2360-72 (to be codified at 42 U.S.C. §§ 681-686) (effective Oct. 1, 1990). The report of the Senate Finance Committee declares that the legislation "replaces the Work Incentive (WIN) program with an entirely new Job Opportunities and Basic Skills Training Program (JOBS) to help welfare recipients attain the ability to enter or reenter gainful employment." FINANCE COMMITTEE REPORT, *supra* note 40, at 3.

59. Each of these features is discussed in the following sections. This overview does not summarize every feature of the Act, or even every feature of the JOBS program. For a general overview of the Act, see STAFF OF HOUSE COMM. ON WAYS AND MEANS, 101ST CONG., 1ST SESS., GENERAL EXPLANATION OF THE FAMILY SUPPORT ACT (Comm. Print 1989). For a more detailed discussion of state choices and potential regulatory issues under the JOBS program, see M. GREENBERG, THE JOBS PROGRAM: ANSWERS AND QUESTIONS (1990) (available from Center for Law & Social Policy).

education and training program to a limited portion of the caseload or to broadly impose mandatory work-related obligations (without much education or training) for a much greater portion of the caseload.

1. Expanding the Mandatory Population

A state's ability to mandate an individual's participation in a JOBS program depends on the individual's exemption status. A non-exempt AFDC recipient can be required to participate and can be sanctioned for failing to participate without good cause.[60] In contrast, an exempt recipient may not be compelled to participate. If she begins to participate and then fails to continue without good cause, her only penalty is loss of priority for future participation.[61]

The FSA substantially expands the non-exempt population, *i.e.*, the number of persons that a state may require to participate. In WIN, parents personally providing care to a child under age six were exempt from mandated participation.[62] Under JOBS, a recipient ceases to be exempt when her youngest child turns three or, at the state's option, any age between one and three.[63] A custodial parent under the age of 20 who has not completed high school,

60. States must sanction individuals required to participate in the program who fail to participate, or fail to accept bona fide offers of employment in which the person is able to engage, without good cause. The needs of the offending individual will not be considered in determining the needs of the overall family, *i.e.*, the sanctioned person is taken out of the AFDC grant. If the offender is the parent or caretaker, the payments for the family will be made in the form of protective payments, *i.e.*, to another individual on the family's behalf, unless the state is unable to locate an appropriate payee after making reasonable efforts. FSA § 201(a), 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 2343, 2359 (to be codified at 42 U.S.C. § 602(a)(19)(G)(i)(I)) (effective Oct. 1, 1990); 45 C.F.R. § 250.34(a), (c) (1989). In an AFDC-UP family, the needs of the spouse will also be excluded from the grant, unless the spouse is participating in JOBS. FSA § 201(a), 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 2343, 2359 (to be codified at 42 U.S.C. § 602(a)(19)(G)(i)(II)) (effective Oct. 1, 1990); 45 C.F.R. § 250.34(c)(2) (1989).

For the first failure to comply, the sanction lasts until the failure to comply ceases. For the second failure to comply, the sanction lasts three months, or until the failure to comply ceases, whichever is longer. For the third and subsequent cases, the sanction lasts six months or until the failure to comply ceases, whichever is longer. FSA § 201(a), 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 2343, 2359 (to be codified at 42 U.S.C. § 602(a)(19)(G)(ii)) (effective Oct. 1, 1990); 45 C.F.R. § 250.34(b) (1989).

In a formal sense, the sanction provisions reflect a modest restriction on state conduct as compared with prior law. Under prior law, states were to sanction individuals who failed to participate without good cause by denying aid for three months in the first instance and for six months in subsequent instances. 45 C.F.R. § 224.51 (1989). In the case of AFDC-UP families, the entire family would be denied aid for the period of the sanction. 45 C.F.R. § 233.100(a)(5) (1989). But though the severity of the sanctions is somewhat reduced, the population potentially subject to the sanctions is vastly increased.

61. FSA § 201(a), 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 2343, 2357 (to be codified at 42 U.S.C. § 602(a)(19)(B)(iii)) (effective Oct. 1, 1990); 45 C.F.R. § 250.31(b)(1) (1989).

62. 42 U.S.C. § 602(a)(19)(A)(v) (Supp. V 1987). States could opt to require parents with children between ages three and five to participate in a Community Work Experience program. 45 C.F.R. § 238.14(b)(2) (1989).

63. FSA § 201(a), 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 2343, 2357-58 (to

may not claim an exemption based on the need to care for her child of any age if the state requires her to participate in an educational activity.[64]

Other than its treatment of parents with young children, JOBS retains most of the exemptions of prior law in identical or near-identical form.[65] The reduction in exemptions for parents with young children, however, substantially increases the potential mandatory population from under 40% to over 60%.[66] If a state denies exemptions for parents with children between ages one and three, it appears that the state can make over 80% of AFDC parents mandatory participants.[67] This is not to say that all of these persons will actually participate in the state program; rather, the state now has the legal authority to require them to participate if it so chooses.

2. *State Discretion to Determine Who Participates*

JOBS gives states substantial discretion to determine how many people actually participate and which people do so. The law has a seemingly broad mandate for participation, accompanied by a number of significant qualifications. When a state implements JOBS,[68] it must require non-exempt recipi-

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be codified at 42 U.S.C. § 602(a)(19)(C), (D)) (effective Oct. 1, 1990); 45 C.F.R. § 250.30(b)(9) (1989).

64. FSA § 201(a), 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 2343, 2358 (to be codified at 42 U.S.C. § 602(a)(19)(E)(i)) (effective Oct. 1, 1990); 45 C.F.R. § 250.32(a) (1989).

65. A person is exempt from participation in the program if she is:

a) ill, incapacitated, or of advanced age;
b) needed in the home because of the illness or incapacity of another household member;
c) a parent or relative personally providing care to a child under three (or at the state's option, an age less than three but not less than one);
d) a parent or relative personally providing care to a child under six unless the state guarantees child care and limits participation to twenty hours or less per week;
e) working 30 or more hours per week;
f) a child under 16 or attending full-time an elementary, secondary, vocational, or technical school;
g) pregnant, after the first three months of pregnancy;
h) residing in an area of the state where the program is not available;
i) the second parent in an AFDC-UP family who meets the terms of an exemption for caring for a child under six unless the state opts to guarantee child care and mandate participation for both parents.

FSA § 201(a), 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 2343, 2357-58 (to be codified at 42 U.S.C. § 602(a)(19)(C), (D)) (effective Oct. 1, 1990); 45 C.F.R. § 250.30 (1989).

66. In fiscal year 1986, 36.3% of female adult AFDC recipients were mandatory WIN registrants. DATA AND MATERIALS, *supra* note 9, at 47 (table A-23). The most frequent exemption was for the care of a child or other dependent person, comprising 46.5% of single-parent caretakers. *Id.* The total of all other reasons for an exemption comprised 11.8% of the caseload. *Id.*

Nationwide, in fiscal year 1986, 60.6% of AFDC families had a child under six; while 22.5% had a child between three and six. *Id.* at 36 (table A-18).

67. Only 14.4% of AFDC children are under two. CHARACTERISTICS AND FINANCIAL CIRCUMSTANCES, *supra* note 13, at 45. And some of those children will have parents under 20, who are potentially subject to the mandatory education provision. *See supra* text accompanying note 65.

68. The general effective date for the Act is October 1, 1990. FSA § 204(a), 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 2343, 2381 (to be codified at 42 U.S.C. § 681). A

ents to participate when the state guarantees child care and must permit participation by those otherwise not required to participate. However, these duties only apply to the extent the program is available in the political subdivision, to the extent state resources permit, and subject to other provisions in the JOBS title of the Act.[69]

Read together, these provisions leave states considerable choice to determine how many people actually participate in their programs. Indeed, this appears to have been Congress' intent.[70] The only section of the FSA that expressly addresses the number of participants is the "participation rates" provision. The participation rates provision provides for a reduction in federal financial contribution to a state's JOBS program unless the state satisfies federal standards for the rate of participation in the program by AFDC recipients, beginning at 7% and increasing to 20% by fiscal year 1995.[71] But this provision is not a mandate; it is simply a fiscal incentive to serve at least the number of people needed to meet participation rates each year. A state not meeting the applicable rate will lose a portion of its federal funds, but will not be violating the law. Moreover, a state may meet the federal participation rate while drawing upon a limited portion of the caseload.[72] Accordingly, the law

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state, however, may begin operating as soon as it makes the required changes in its state plan and notifies the Secretary of HHS of its desire to become subject to the law as of the first day of any calendar quarter on or after the date of promulgation of the proposed regulations (which occurred on April 18, 1989). *Id.* § 204(b)(1)(A), 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) at 2381 (to be codified at 42 U.S.C. § 681). The program may initially operate in only a portion of the state. The state must have the program available in each portion of the state where it is feasible to do so no later than October 1, 1992. *Id.* § 201(b), 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) at 2361 (to be codified at 42 U.S.C. § 682(a)(1)(D)(i)); 45 C.F.R. § 250.11 (1989).

69. FSA § 201(a), 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 2343, 2357 (to be codified at 42 U.S.C. § 602(a)(19)(B)(i)) (effective Oct. 1, 1990).

70. *See Welfare Reform Hearings, supra* note 46.

71. The AFDC participation rates, by year, are:

Fiscal Year	Rate
1990	7%
1991	7%
1992	11%
1993	11%
1994	15%
1995	20%

FSA § 201(c)(2), 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 2343, 2374-75 (to be codified at 42 U.S.C. § 603(l)(3)(A)) (effective Oct. 1, 1990). Federal financial contributions to a state program will be reduced to 50% of program costs when the state fails to meet the federal participation standard. Generally, a state which is not suffering a fiscal penalty will receive federal funds covering 60% or more of the costs for JOBS activities and full-time JOBS staff. *See id.*, 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) at 2373-74 (to be codified at 42 U.S.C. § 603(l)(1)(A)-(B)) (effective Oct. 1, 1990); 45 C.F.R. § 250.73 (1989).

No penalty will be imposed for a state's failure to meet the standards in fiscal year 1990. FSA § 201(c)(2), 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 2343, 2375 (to be codified at 42 U.S.C. § 603(l)(3)(C)) (effective Oct. 1, 1990); 45 C.F.R. § 250.74(b)(1)(ii) (1989).

72. The calculation is based on a percentage of those required to participate in the program. FSA § 201(c)(2), 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 2343, 2375 (to be codified at 42 U.S.C. § 603(l)(3)(B)(iii)) (effective Oct. 1, 1990). For example, when the rate is

seems to envision giving states the choice between having a program in which resources are concentrated on a limited portion of the caseload or having a program in which mandates are imposed on the vast majority of the population.

However, federal regulations may substantially curtail the discretion implicit in the statute. While the FSA sets participation rates, the statute let HHS define "participation."[73] HHS's regulations set a very high standard for the amount of activity an individual must have to be considered a participant.[74] Because the standards are so high, states have to impose obligations on far more than 7% of their populations to meet a 7% participation rate.[75] Thus, regulations may drastically reduce what is otherwise the state option to have a program that effectively targets limited resources.

A second provision will further reduce state discretion in later years. Beginning in fiscal year 1994, states must satisfy special participation rates for AFDC-UP families.[76] To avoid a loss of higher federal financial contribution, states must require at least one parent in each AFDC-UP family to participate, normally for at least sixteen hours per week,[77] in one of a number of specified activities.[78] Each state must extend the requirement to at least 40%

7%, if a state has 100 non-exempt persons, and 40 exempt persons, it must have participation by seven people (7% of 100). However, the seven people can be any combination of non-exempt persons and exempt volunteers. 45 C.F.R. § 250.74(b)(4) (1989).

73. FSA § 201(c)(2), 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 2343, 2375 (to be codified at 42 U.S.C. § 603(l)(3)(D)) (effective Oct. 1, 1990). The statute only states that mere registration is not sufficient to constitute participation.

74. *See* 45 C.F.R. § 250.78 (1989). Generally, the regulations require that the number of persons counting toward the state's participation rate be scheduled for an average of at least 20 hours a week of program activity, and actually attend at least 75% of scheduled hours.

75. Since some participants would not meet their requirements — because, for example, they would go off AFDC, get a job, be sick, have a family crisis, move — states would necessarily have to impose requirements on far more than 7% of the population to attain participation by 7%.

76. FSA § 201(c)(2), 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 2343, 2376 (to be codified at 42 U.S.C. § 603(l)(4)) (effective Oct. 1, 1990); 45 C.F.R. § 250.33 (1989); 45 C.F.R. § 250.74(c) (1989).

77. FSA § 201(c)(2), 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 2343, 2376 (to be codified at 42 U.S.C. § 603(l)(4)(A)(i)) (effective Oct. 1, 1990); 45 C.F.R. § 250.33(b) (1989). The 16 hour per week obligation applies unless the figure obtained by dividing the AFDC grant (minus the amount of child support reimbursed to the state) by the minimum wage leads to a lesser obligation. Parents under 25 without a high school diploma or its equivalent may be required to participate in education, which counts toward satisfying the requirement if they are making satisfactory progress. 45 C.F.R. § 250.33(a) (1989).

78. The permitted activities are:

a) a work supplementation program;
b) a community work experience program or other work experience program;
c) on-the-job training;
d) a state-designed work program approved by the Secretary of HHS;
e) for parents under 25 who have not completed high school or its equivalent, an educational activity directed at attaining a high school diploma or equivalent.

FSA § 201(c)(2), 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 2343, 2376 (to be codified at 42 U.S.C. § 603(l)(4)(A)(i)) (effective Oct. 1, 1990). A state-designed work program may

of its AFDC-UP population in fiscal year 1994, increasing to 75% by 1997.[79]

The state's decision as to which recipients must participate in a JOBS program is also affected, again indirectly, by the Act's use of target groups. The Act specifies a set of federal target groups and provides that federal financial contribution to the program will be reduced unless the state makes at least 55% of its JOBS expenditures for target groups' members.[80] The Act further states that in determining priority of participation within the target groups, states must give first consideration to applicants and recipients who volunteer to participate.[81]

Taken together, the participation provisions nonetheless leave states with enormous flexibility to determine who participates, at least in the early years of JOBS' implementation. While states must assure that 55% of their resources go to target group members (or risk a lower rate of federal participa-

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not substitute education or training activities for the work requirement in a state-designed work program. 45 C.F.R. § 250.33(a) (1989).

79. The AFDC-UP participation rates, by year, are:

Fiscal Year	Rate
1994	40%
1995	50%
1996	60%
1997	75%
1998	75%

FSA § 201(c)(2), 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 2343, 2376 (to be codified at 42 U.S.C. § 603(l)(4)(B)) (effective Oct. 1, 1990); 45 C.F.R. § 250.74(c) (1989). Regulations indicate that the penalty for non-compliance is a reduction in federal financial contribution to the program to 50%. 45 C.F.R. § 250.74(c)(1) (1989).

80. The target groups are:

a) recipients who have received aid for at least 36 of the preceding 60 months;
b) applicants who received aid for at least 36 of the 60 months prior to application;
c) custodial parents under 24 who either:
   i) have not completed high school and are not enrolled in high school or its equivalent at the time of application; or
   ii) have had little or no work experience in the preceding year;
d) members of a family in which the youngest child is within two years of being ineligible for AFDC because of age (*e.g.*, age 16 in a state that ends AFDC eligibility at age 18).

FSA § 201(c)(2), 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 2343, 2374 (to be codified at 42 U.S.C. § 603(l)(2)(A)-(B)) (effective Oct. 1, 1990); 45 C.F.R. § 250.1 (1989). If the state does not meet target group requirements, federal financial contribution to the program is reduced to 50%. 45 C.F.R. § 250.74(b) (1989).

81. FSA § 201(a), 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 2343, 2357 (to be codified at 42 U.S.C. § 602(a)(19)(B)(ii)) (effective Oct. 1, 1990); 45 C.F.R. § 250.31 (1989). The preamble to the JOBS regulations casts uncertainty on what otherwise appears to be a clear and explicit provision. The preamble suggests that the state's duty to serve target group volunteers may be qualified by the goals of the state program, availability of resources, and effect of selection of individuals on the state's ability to meet participation rate standards. *See* 54 Fed. Reg. 42,167 (1989). The preamble further states that "the Act does not require that volunteers necessarily be served before others, regardless of individual circumstances. Rather, a state must give priority to a volunteer over a non-volunteer when all relevant factors are equal." 54 Fed. Reg. 42,167 (1989).

In light of the preamble language, it seems likely that states wishing to do so will have the ability to minimize any priority for target group volunteers, unless a court rejects HHS's position.

tion), the target groups generally already comprise 55% or more of the caseload.[82] Although state discretion will decrease as participation rates rise and as states prepare to implement the required AFDC-UP provisions in fiscal year 1994, at least in the FSA's first years, state discretion will be substantial.

3. *Range of Services*

The Act lists "mandatory" components which must be included in state programs, as well as "optional" components from which states must make choices. The mandatory components of a state JOBS program are: a) educational activities, including high school education or its equivalent (combined with training as needed), basic and remedial education to achieve a basic literacy level, and education for individuals with limited English proficiency; b) job skills training; c) job readiness activities to help prepare participants for work; and d) job development and job placement.[83] States must also include at least two of the following four optional components: a) group and individual job search;[84] b) on-the-job training; c) a work supplementation program;[85]

82. Nationwide, from October 1985 to September 1986, less than 4% of the AFDC caseload had a youngest child 16 or older. DATA AND MATERIALS, *supra* note 9, at 36 (table A-18). During the same period about 40% of recipients had been on aid for at least 36 months since their last case opening. *Id.* at 38-39 (table A-19). On average about 37% of AFDC female parents in 1986 were 25 or under. *Id.* at 29 (table A-13). While there is some duplication between groups (*e.g.*, young parents who have been on aid for 36 out of 60 months), these figures suggest that states may not find it difficult to locate sizeable numbers of recipients from the target groups. The Congressional Budget Office estimates that the target groups represent roughly 60% of AFDC families, with some significant variations from state to state. CONGRESSIONAL BUDGET OFFICE, WORK AND WELFARE: THE FAMILY SUPPORT ACT OF 1988, at 2 (1989) [hereinafter WORK AND WELFARE].

83. FSA § 201(b), 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 2343, 2362 (to be codified at 42 U.S.C. § 682(d)(1)(A)(i)) (effective Oct. 1, 1990); 45 C.F.R. § 250.44 (1989).

84. The Act does not define the contents of a job search. It does, however, limit the maximum length of time a state may require for a job search. A state may impose a job search for not more than eight weeks, commencing at the time of application. During that period, an individual may not be required to participate in job search for more than three weeks before the state conducts an assessment of the person's experience and needs. After the initial eight-week period, the state may require additional job search not in excess of eight weeks in any period of 12 consecutive months following the initial period. FSA § 201(b), 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 2343, 2367 (to be codified at 42 U.S.C. § 682(g)(2)) (effective Oct. 1, 1990); 45 C.F.R. § 250.60(a)-(c) (1989).

Job search activities after the periods discussed above may be required only in combination with some other education, training, or employment activity. Job search may not be treated, for any purpose, as an activity under the program if the individual has participated in job search for four out of the preceding 12 months. FSA § 201(b), 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 2343, 2367 (to be codified at 42 U.S.C. § 682(g)(3)) (effective Oct. 1, 1990); 45 C.F.R. § 250.60(d), (e) (1989).

85. In work supplementation programs, the funds that would otherwise be paid to families as AFDC grants are instead used to subsidize jobs for participants. A supplemented job is one provided by the state or local agency or one provided by any other employer for which all or part of the wages are paid by the state or local agency. The state may provide or subsidize any job which the state determines to be appropriate. FSA § 201(b), 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 2343, 2364 (to be codified at 42 U.S.C. § 682(e)(3)(C)) (effective Oct. 1, 1990); 45 C.F.R. § 250.62 (1989).

and d) either a community work experience program or another work program approved by the Secretary of HHS.[86] The state may, but need not, offer post-secondary education and such other education, training, and employment activities as may be determined by the state and allowed by HHS regulations.[87]

Unfortunately, the Act provides little guidance as to what is required for a state to claim that it is providing a service. In contrast to prior WIN law, which required that a certain percentage of resources go to on-the-job training,[88] there are no percentage requirements for resources to be committed to any particular component.[89] While there may be some minimal threshold level below which one could contend that the service does not exist in the state, neither the Act nor the regulations suggest what that level might be.

4. State Discretion to Determine What a Participant Receives

The Act also gives states broad discretion to determine the nature of individual activities. The only explicit restriction on state discretion involves circumstances where a person who is required to participate must receive some sort of educational placement.[90] Otherwise, the choice of when a participant engages in a particular activity is left to be resolved between the state and the participant.

The Act has two distinct provisions concerning basic education, one affecting persons twenty and over, and another affecting custodial parents under twenty. If a state requires participation by an individual twenty or over who

86. FSA § 201(b), 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 2343, 2362-63 (to be codified at 42 U.S.C. § 682(d)(1)(A)(ii)) (effective Oct. 1, 1990); 45 C.F.R. § 250.45 (1989). Community work experience involves work without pay for a state-designated employer for a designated number of hours each month. *See* FSA § 201(b), 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 2343, 2365-67 (to be codified at 42 U.S.C. § 682(f)) (effective Oct. 1, 1990); 45 C.F.R. § 250.63 (1989).

87. FSA § 201(b), 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 2343, 2363 (to be codified at 42 U.S.C. § 682(d)(1)(B)); 45 C.F.R. §§ 250.46, 250.47 (1989). In the preamble comments accompanying the proposed regulations, HHS notes that "[w]hile we cannot prohibit the use of JOBS funds for [post-secondary education], we are extremely concerned about the potential cost. We strongly urge States to use other available resources for post-secondary education and concentrate JOBS funds on short-term activities which lead to employment. . . . We will monitor State expenditures in this area carefully." 54 Fed. Reg. 15,655 (1989).

88. *See supra* text accompanying note 37.

89. Regulations set minimum requirements for what constitutes a statewide program, but do not indicate how much of any particular service must be provided. The regulations provide that a state's program will be considered statewide if a minimal JOBS program (high school or equivalent education, one optional component, and information and referral to employment services) is available in political subdivisions where 95% of the adult recipients reside and, a complete JOBS program (which includes all the mandatory components as well as any two optional components) is available in all Metropolitan Statistical Areas of the state and in political subdivisions where 75% of the adult recipients reside. 45 C.F.R. § 250.11 (1989).

That a component exists in an area does not determine actual recipient access to the component. For example, a state might have on-the-job training components "present" in a subdivision, while serving only 1% of the recipients in that area.

90. *See infra* notes 92-95 and accompanying text.

lacks a high school diploma or its equivalent, the state must require involvement in educational activities unless the individual demonstrates a basic literacy level *or* the individual's employability plan identifies a long-term employment goal that does not require a high school diploma or its equivalent. The state may assign other activities, so long as they do not interfere with the individual's participation in the appropriate educational activity.[91] Neither the Act nor the regulations suggest criteria for determining whether an individual has a long-term employment goal that does not require a diploma or its equivalent.

Custodial parents under twenty who have not completed high school or its equivalent are required to participate in an educational activity to the extent the program is available in their political subdivision and if state resources otherwise permit. This requirement extends to parents who are otherwise exempt from JOBS because they are personally caring for young children.[92] The state may also require participation in an educational activity on a full-time basis (as defined by the educational provider) notwithstanding the general limit on full-time program participation for parents with young children.[93] States may exempt those under eighteen from the educational requirements, under criteria adopted in accordance with HHS regulations, and may require a custodial parent who is eighteen or nineteen years old to participate in work or training if the parent fails to make good progress in the educational activity or if the state determines, pursuant to an educational assessment, that participation is inappropriate for the parent.[94]

Apart from these educational provisions, the FSA is silent as to when an individual is entitled to a particular service. On the face of the statute, it appears that the individual participant would have a substantial voice in choosing her activities. The Act provides that the state must make an initial assessment of the educational, child care and other supportive service needs, skills, prior work experience, employability, and family circumstances of the participant.[95] Then, in consultation with the participant, the state must develop an employability plan which explains the activities in which the individual will participate, the services to be provided by the state — including child

91. FSA § 201(b), 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 2343, 2363 (to be codified at 42 U.S.C. § 682(d)(2)) (effective Oct. 1, 1990); 45 C.F.R. § 250.32(b) (1989). HHS regulations define a "basic literacy level" as "a literacy level that allows a person to function at a level equivalent to at least grade 8.9." 45 C.F.R. § 250.1 (1989).

92. FSA § 201(a), 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 2343, 2358 (to be codified at 42 U.S.C. § 602(a)(19)(E)(i)) (effective Oct. 1, 1990); 45 C.F.R. § 250.32(a) (1989).

93. FSA § 201(a), 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 2343, 2358 (to be codified at 42 U.S.C. § 602(a)(19)(E)(ii)(I)) (effective Oct. 1, 1990); 45 C.F.R. § 250.32(a)(1) (1989).

94. FSA § 201(a), 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 2343, 2358 (to be codified at 42 U.S.C. § 602(a)(19)(E)(ii)(II)-(III)) (effective Oct. 1, 1990); 45 C.F.R. § 250.32(a)(2), (3) (1989). The HHS regulations sharply limit instances in which states may exempt parents under 18 from the requirements.

95. FSA § 201(b), 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 2343, 2361 (to be codified at 42 U.S.C. § 682(b)(1)(A)) (effective Oct. 1, 1990); 45 C.F.R. § 250.41(a) (1989).

care and other supportive services, and which sets forth an employment goal.[96] The Act provides that the employability plan "shall, to the maximum extent possible and consistent with this section, reflect the respective preferences of such participants."[97]

Clearly, this language permits a state to run a program that reflects participants' individual choices. But for a state that is not so inclined, a recipient objecting to a state-mandated placement will likely face two critical barriers. First, particular services may not be available in her area, or may be filled to their limited capacity. As noted above, while JOBS lists the services that must be "available," it does not specify how many people must be able to receive them or in what parts of the state they must be available. Accordingly, a state can effectively dictate participants' choices by regulating the supply of services. Second, a state may restrict access to services by setting up criteria for services or sequences of activities. For example, the state might provide that individuals with a high school diploma must go through eight weeks of job search before being considered for any training opportunity. By creating sufficient hurdles, a state structure may prevent an individual from exercising genuine choice.

5. *Child Care and Supportive Services*

The FSA contains a broad guarantee of child care, but leaves most choices about the nature of child care to the states. States are required to guarantee child care for JOBS participants, for other recipients who are satisfactorily participating in an approved education or training program, and for recipients who need child care to accept or retain employment.[98] The manner in which child care is provided is left up to the states.[99] States may, but are

96. FSA § 201(b), 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 2343, 2361 (to be codified at 42 U.S.C. § 682(b)(1)(B)) (effective Oct. 1, 1990); 45 C.F.R. § 250.41(b) (1989).

97. FSA § 201(b), 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 2343, 2361 (to be codified at 42 U.S.C. § 682(b)(1)(B)) (effective Oct. 1, 1990); 45 C.F.R. § 250.41(b) (1989). After assessment and development of the employability plan, the state may require the participant to negotiate and enter into an agreement specifying such matters as the participant's obligations under the program, the duration of participation, and the activities to be conducted and services to be provided during participation. The choice of whether to establish a participant-agency agreement is up to the state. FSA § 201(b), 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 2343, 2361-62 (to be codified at 42 U.S.C. § 682(b)(2)) (effective Oct. 1, 1990); 45 C.F.R. § 250.42 (1989). The employability plan is not in itself a contract and the decision as to whether to establish a contract belongs to the state.

98. The FSA requires states to guarantee child care:

a) for each family with a dependent child requiring such care, to the extent that such care is determined by the state agency to be necessary for an individual in the family to accept employment or remain employed; and
b) for each individual participating in an education and training activity if the state agency approves the activity and determines that the individual is satisfactorily participating in the activity.

FSA § 301, 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 2343, 2382 (to be codified at 42 U.S.C. § 602(g)(1)(A)(i)) (effective Oct. 1, 1990); 45 C.F.R. § 255.2(a) (1989).

99. The state may guarantee child care by:

a) providing the care directly;

not required to, pay participants up to the local market rates for child care.[100]

Each state must also pay or reimburse participants for transportation and other work-related expenses, including work-related supportive services which the state determines are necessary to enable the person to participate in the JOBS program.[101] The determination of what constitutes a supportive service, and what is necessary for JOBS participation, appears to be left to each state.[102]

The FSA also provides continuing child care and medical assistance for a limited period of time for some families who lose AFDC eligibility because of employment. States must provide up to one year of continued child care assistance[103] and up to one year of continued medical assistance.[104]

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b) arranging the care through providers by purchase of service contracts or vouchers;
c) providing cash or vouchers in advance to the caretaker relative in the family;
d) reimbursing the caretaker relative; *or*
e) adopting such other arrangements as the agency deems appropriate.

FSA § 301, 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 2343, 2382 (to be codified at 42 U.S.C. § 602(g)(1)(B)(i)-(v)) (effective Oct. 1, 1990); 45 C.F.R. § 255.3(a) (1989). The regulation also provides for states to meet their duty to guarantee care through the use of the pre-existing AFDC child care disregard, and by arranging with other agencies and community volunteer groups for non-reimbursed care.

100. The state must pay, at least, the lesser of:
a) the actual cost of child care; *or*
b) the dollar amount of the child care disregard for which the family is otherwise eligible, *i.e.*, $175 per month for a child two or over, $200 for a child under two or, if higher, an amount established by the state.

However, the state may not reimburse the cost of child care in an amount that is greater than the applicable local market rate (as determined by the state in accordance with regulations issued by the Secretary of HHS). FSA § 301, 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 2343, 2382 (to be codified at 42 U.S.C. § 602(g)(1)(C)) (effective Oct. 1, 1990); 45 C.F.R. § 255.4(a) (1989).

101. FSA § 301, 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 2343, 2382-83 (to be codified at 42 U.S.C. § 602(g)(2)) (effective Oct. 1, 1990); 45 C.F.R. § 255.2(c) (1989).

102. A review of approved state plans for 15 states that began implementation of JOBS on July 1, 1989, found that most of the plans had long lists of potential supportive services but few statements about when an individual would be entitled to the services. *See* M. GREENBERG & J. LEVIN-EPSTEIN, THE JOBS PROGRAM: GOOD IDEAS AND SOME CONCERNS IN THE FIRST ROUND OF STATE PLANS 15 (1989) (available from Center for Law & Social Policy). A number of the plans indicated that the provision of services was "subject to available resources," *id.*, raising concern that the provision of supportive services may be highly discretionary in those states.

103. Generally, an AFDC family will be entitled to child care if the state determines the care is necessary for employment, *and* the recipient loses AFDC eligibility because of increased hours of employment, wages from employment, or loss of the AFDC earnings disregards. FSA § 302(a)(3), 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 2343, 2384 (to be codified at 42 U.S.C. § 602(g)(1)(A)) (effective Apr. 1, 1990); 45 C.F.R. § 256.2 (1989).

The family must also meet a number of additional conditions. The family must:
a) have received AFDC for at least three of the six months prior to the loss of eligibility;
b) continue to have a child who is — or if needy, would be — a dependent child;
c) not fail to cooperate with enforcement of child support obligations;
d) not terminate employment without good cause; *and*
e) contribute to the cost of care under a sliding scale established by the state.

FSA § 302(c), 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 2343, 2384 (to be codified at 42 U.S.C. § 602(g)(1)(A)) (effective Apr. 1, 1990); 45 C.F.R. § 256.2 (1989). Under prior

6. Funding

JOBS funding is a capped entitlement for states. The federal government will participate in a state's JOBS expenditures up to a specified maximum. Program funding which exceeds the maximum must be paid for by the state from state funds.

Federal JOBS funding is provided at several matching rates, most frequently 50-60%.[105] The maximum amount a state may receive is determined by a formula in which the federal government's maximum contribution to the JOBS program nationwide is divided by the state's share of adult AFDC recipients.[106] In addition to the capped federal funds for JOBS programs, states may claim open-ended federal participation in their child care costs at the

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law, states could, but were not required to, provide up to 90 days of child care assistance for persons obtaining employment through WIN. *See* 45 C.F.R. § 224.30(b)(2) (1987).

104. FSA § 303(a), 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 2343, 2385-91 (to be codified at 42 U.S.C. § 1396). Generally, states must provide the first six months of coverage without a fee, either through continued Medicaid eligibility or by paying a family's expenses for premiums, deductibles, coinsurance, or other costs for health insurance offered by the employer. After the first six months, states must offer an additional six months of coverage for families with income (after child care deductions) below 185% of the poverty level, but states may impose a premium for families with earnings exceeding 100% of the poverty level. States have a number of options as to both the scope of services and the method of providing medical coverage in the second six-month period. *Id.*

Under prior law, states were required to provide four months of extended Medicaid coverage, with no cost to the recipient, for families losing AFDC because of increased hours or wages from employment. *See* 42 U.S.C. § 1396(a)(e)(1) (1982). States were required to provide nine months of extended Medicaid coverage, with no cost to the recipient, for families losing AFDC because their earnings disregards expired. At the state's option, the nine-month period could be extended to 15 months. *See* 42 U.S.C. § 602(a)(37) (Supp. V 1987).

105. The capped entitlement formula for JOBS expenditures provides, subject to a maximum amount per state:

a) 90% federal match for expenditures up to the state's fiscal year 1987 WIN allocation;
b) the Medicaid matching rate, or 60%, whichever is higher, for non-administrative costs and costs of full-time staff operating the program;
c) 50% for administrative costs of the program (other than personnel costs for full-time staff operating the program);
d) 50% for the costs of transportation and other work-related supportive services.

FSA § 201(c)(2), 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 2343, 2373-74 (to be codified at 42 U.S.C. § 603(*l*)(1)(A)) (effective Oct. 1, 1990); 45 C.F.R. § 250.73 (1989). The Medicaid match rate is based on a formula varying with state per capita incomes. The wealthiest states have a 50% match rate; the poorest states have match rates approaching or exceeding 80%. The formula for calculating Medicaid match rates and a chart listing state Medicaid match rates can be found in STAFF OF HOUSE COMM. ON WAYS AND MEANS, 101ST CONG., 2D SESS., OVERVIEW OF ENTITLEMENT PROGRAMS: 1990 GREEN BOOK: BACKGROUND MATERIAL AND DATA ON PROGRAMS WITHIN THE JURISDICTION OF THE COMMITTEE ON WAYS AND MEANS 567-69 (Comm. Print 1990).

106. *See* FSA § 201(c)(1), 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 2343, 2373 (to be codified at 42 U.S.C. § 603(k)(1)-(2)) (effective Oct. 1, 1990). The capped amounts for total federal JOBS expenditures are:

state's Medicaid matching rate.[107]

The capped entitlement does not, in itself, require a state to spend funds. It only sets the terms under which federal funds are available. Accordingly, the cap only limits those states which envision more comprehensive, and accordingly more expensive, programs.

III.
STATE IMPLEMENTATION OF JOBS: THE CONSEQUENCES OF DISCRETION AND EARLY LESSONS FOR OTHER STATES FROM THE GAIN EXPERIENCE

What can we expect from JOBS implementation? On the one hand, it is clear that we can expect substantial state discretion over who is exempt from the program, who actually participates, what they participate in, and the nature of child care and support services provided to program participants. But is it possible to say more about the likely directions for state programs?

One instructive source of information is the experience of California in operating the GAIN program.[108] GAIN was a WIN demonstration program,[109] though not a typical one. It involved a much greater state fiscal commitment and a much larger educational component than most WIN demonstration programs. GAIN's pre-JOBS structure was similar to JOBS in important respects, though also different in some crucial ways. This section will first summarize the key elements of the GAIN statute as it existed prior to state legislation conforming it to the FSA and then will draw upon GAIN's early experiences to suggest some issues and lessons for JOBS implementation.

A. The GAIN Structure

The GAIN statute, as initially enacted, committed California to a program of education and training that was intended eventually to extend to every applicant and recipient required under federal law to register for WIN. In addition, the program was to be available on a voluntary basis to applicants

Fiscal Year	Capped Amount (in billions of dollars)
1989	0.6
1990	0.8
1991	1
1992	1
1993	1
1994	1.1
1995	1.3
1996	1

Id. (to be codified at 42 U.S.C. § 603(k)(3)) (effective Oct. 1, 1990).

107. *Id.* § 301, 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) at 2383 (to be codified at 42 U.S.C. § 602(g)(3)(A)) (effective Oct. 1, 1990); 45 C.F.R. § 255.5(b) (1989).

108. CAL. WELF. & INST. CODE § 11320 (Deering 1985).

109. GAIN's status as a WIN demonstration program terminated when the state began implementing JOBS on July 1, 1989. *See* FSA § 204(b), 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 2343, 2381 (to be codified at 42 U.S.C. § 681 note) (effective Oct. 1, 1990).

and recipients exempt from WIN.[110] At its inception, GAIN required each county to have a planning process.[111] The initial statute gave counties up to two years to develop county plans, an additional year to make the program fully operational in the county, and up to two more years to phase in the county caseload.[112]

When a county began implementing GAIN, participation would involve a sequence of activities.[113] First, the participant would be appraised to determine whether deferral from participation was appropriate[114] and, if not, to identify the participant's first activity. Participants lacking basic literacy or math skills, a high school diploma or its equivalent, or English language skills were required to begin with remedial education, instruction for a general educational development certificate, or English-as-a-second-language [hereinafter ESL] instruction.[115] Otherwise, a participant would usually begin with three weeks of job club or supervised job search.[116] A contract between the participant and county would outline the participant's activities and the support services which the county would provide.[117]

If the participant did not find a job during this initial stage, the next step would be an "assessment" of her skills and needs[118] and the creation of an amended contract specifying further training or education.[119] The participant would then enter a post-assessment "component."[120] This could be a job placement program, such as grant diversion, supported work, or transitional employment; an educational program, such as adult, vocational or community college education; or pre-employment preparation (workfare).[121]

110. CAL. WELF. & INST. CODE § 11320.1 (Deering 1985). The most frequent basis for an exemption from WIN was that the recipient was the parent of a child under the age of six. In fiscal year 1986, 60% of California's female AFDC recipients were exempt because they were caring for a young child or an incapacitated person. CHARACTERISTICS AND FINANCIAL CIRCUMSTANCES, *supra* note 13, at 54 (table 23).

111. CAL. WELF. & INST. CODE § 11320.2 (Deering 1985). For a discussion of the planning process, see *infra* text accompanying notes 178-80.

112. CAL. WELF. & INST. CODE § 11320.2(f) (Deering 1985).

113. The following text discusses the statutorily mandated sequence. As discussed *infra* text accompanying notes 192-95, it is uncertain how many people will actually ever go through the statutorily mandated sequence.

114. Possible reasons for deferral included being temporarily laid off with a definite callback date, having emotional or mental problems that precluded current participation, having a medically verified illness, or working 15 or more hours per week. CAL. WELF. & INST. CODE § 11320.5(a) (Deering 1985).

115. *Id.* § 11320.5(b)(6). By regulation, the Department of Social Services provided individuals with the option to participate in three weeks of job search before beginning a basic eduction activity. DEPARTMENT OF SOCIAL SERVICES, MANUAL OF POLICIES AND PROCEDURES § 42-772.53.

116. *Id.* § 11320.5(b)(2), (3). Participants who had been terminated from aid because of employment more than twice in the three years before registration went directly to the assessment stage without job search. *Id.* § 11320.5(b)(4).

117. *Id.* § 11320.5(b).

118. *Id.* § 11320.5(c).

119. *Id.* § 11320.5(d).

120. *Id.*

121. *Id.* § 11320.3(d).

If the participant was unemployed after the completion of her training or education, the county would refer her to job search for ninety days.[122] If she did not find employment during that period, she would be required to spend the next year in long-term pre-employment preparation, *i.e.*, workfare. After one year, the participant would undergo another assessment and begin a new amended contract.[123] Non-exempt participants were required to participate in some activity as long as they received AFDC.[124]

Throughout GAIN participation, a recipient with a child under age twelve was entitled to receive the child care needed for participation[125] at regional market rates.[126]

B. Lessons to Be Learned from California's GAIN Experience

1. A Welfare/Employment Program with a Substantial Commitment to Education for a Broad Population Costs More Money than the Federal Government and Many States Are Prepared to Commit

An education and training program with broad participation by AFDC recipients requires a state to commit more funds than JOBS provides. Unless a state is prepared to commit substantial unmatched state funds, it will be forced to choose between broad participation and the nature of services. Initial projections estimate that most states will spend far less in relation to their AFDC populations than California committed to GAIN.[127] Accordingly, these programs may be expected to have fewer participants, less extensive services, or both.

GAIN's budget for 1988-1989 was $368.4 million,[128] which accounted for approximately 60% of the non-federal WIN spending in the country in fiscal year 1989.[129] The State Legislative Analyst estimated that a fully funded budget for 1988-1989, without full implementation in much of the state, would have been $542 million.[130]

Why were GAIN's costs so high? Between 1986 and 1988, GAIN's esti-

122. *Id.* § 11320.5(d).

123. *Id.*

124. Non-exempt participants who failed to participate without good cause were subject to sanctions. For the first infraction, the recipient lost control of her grant, and the county administered the grant through "money management" for three months. *Id.* § 11320.6(b). For subsequent infractions, the family's grant was reduced or eliminated for three, and then six, months. *Id.* §§ 11308, 11320.6(b).

125. *Id.* § 11320.3(e).

126. Regional market rates were defined as care costing up to 1.5 standard deviations above the mean cost of care for the region. *Id.* § 11320.3(f).

127. *See infra* notes 137-39 and accompanying text.

128. The Governor's proposed budget had been $408 million. REPORT OF THE LEGISLATIVE ANALYST TO THE JOINT LEGISLATIVE BUDGET COMMITTEE, THE 1988-89 BUDGET: PERSPECTIVES AND ISSUES 145-46 (1988) [hereinafter PERSPECTIVES AND ISSUES].

129. WORK AND WELFARE, *supra* note 83, at 23 (table 11).

130. PERSPECTIVES AND ISSUES, *supra* note 129, at 146. The Legislative Analyst projected that after costs had stabilized, in 1991-1992, the annual budget would be $553 million.

mated cost per person increased by 130%.[131] The primary reason for increased costs was the provision of basic education. California originally estimated that 15% of the population would begin the program in remedial education. Based on initial experience, however, the state found that 67% of its existing caseload and 57% of all applicants would need remedial education.[132] In the first fifty months of the program, 47% of those persons who had participated in an activity received remedial education.[133] Consequently, California had to adjust annual education costs from $16 million to $152 million.[134]

While there will be some variation, there is no reason to expect substantially different educational needs among many other states. Yet despite the potential costs, the JOBS funding level is far below that of GAIN. JOBS spending will be constrained by both the federal funding cap and the fact that states need not draw down their full capped entitlement.[135] Therefore, while the federal capped entitlement for fiscal year 1992 is $1 billion, the Congressional Budget Office [hereinafter CBO] projects that the cap will not be reached because most states will not seek their full potential amount.[136] Total federal AFDC outlays for JOBS, exclusive of child care expenditures, are projected to peak at $635 million in fiscal year 1992.[137] Total state and federal

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Id. at 149. It is anticipated that over time costs will decline as persons move out of the more expensive education components and into the cheaper work components.

131. As a result, projected savings turned into costs. In 1986, the state agency estimated that when the program was fully implemented, it would yield net annual savings of $109 million; by 1988, the agency estimated that full implementation would produce net annual costs of $65 million. *Id.* at 150.

132. *Id.* at 153.

133. An additional 6.9% received vocational training and education. *See* CALIFORNIA DEP'T OF SOCIAL SERVICES, GAIN MONTHLY ACTIVITY REPORT, CUMULATION OF STATEWIDE GAIN DATA, JULY 1986-SEPTEMBER 1988, at 25 (1988) [hereinafter STATEWIDE GAIN DATA].

The figures are both overstated and understated. On the one hand, only 69,414 of the 140,924 registrants (49.3%) had actually participated in an activity. If the calculation were based on the number of registrants, the percentage receiving education would be substantially lower. On the other hand, the data after 50 months of the program's operation provides a picture over time for participants who entered early in this period but not for those who entered the program more recently. Some of the recent entrants, who had completed only early program stages by September 1988, will have eventually entered education and training components.

134. PERSPECTIVES AND ISSUES, *supra* note 129, at 153.

135. *See supra* notes 106-08 and accompanying text.

136. WORK AND WELFARE, *supra* note 83, at 23. CBO projects that federal spending will never exceed more than 67% of the cap in any year between 1989 and 1993. *Id.*

CBO projects that state spending will actually decrease when states implement JOBS. The Act provides that state or local expenditures for activities that promote the purposes of JOBS must be maintained at least at the level of such expenditures for fiscal year 1986. FSA § 201(b), 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 2343, 2361 (to be codified at 42 U.S.C. § 682(a)(3)) (effective Oct. 1, 1990); 45 C.F.R. § 250.72(b) (1989). Otherwise, states are largely free to reduce funding commitments. CBO projects that states will commit one-half of their savings from the improved federal matching rate to JOBS expenditures. WORK AND WELFARE, *supra* note 83, at 19-20.

137. WORK AND WELFARE, *supra* note 83, at 23. The year 1992 is used for comparison

spending will be approximately $1.075 billion.[138] In other words, California's spending in 1988-89 would be approximately equivalent to one-third of the projected spending for the entire country in 1991-92.

While most states will not seek their full capped entitlements, those states seeking to run the largest education and training programs will reach or exceed their capped limits. But based on the JOBS formula, unexpended federal funds in the JOBS authorization will not be shifted to states wishing to run more expensive programs;[139] rather, the funds will remain unspent. As a result, the capped entitlement structure will likely inhibit the implementation of more intensive programs in those states otherwise inclined to do so.[140]

Many states will be unable to provide meaningful education and training given the projected funding levels. CBO projections for program implementation assume that many states will administer programs that provide education and training to a small percentage of participants and offer "other work programs" to everyone else.[141]

"Other work programs" may involve some form of job search, where an individual is required to do a state-determined number of job searches in a period of time and faces termination from aid unless the searches are properly verified.[142] "Other work programs" may also involve workfare components,

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purposes because GAIN is projected to be fully implemented at that time and because states are required to have implemented their JOBS programs on a statewide basis by October 1, 1992.

138. CBO projects that there will be an average match rate of 59% for state expenditures. *Id.* at 19.

139. *See supra* notes 106-08 and accompanying text.

140. CBO estimates that the capped formula will reduce federal funds available to states with the highest cost programs by about $335 million over the five year period between 1989 and 1993. About 80% of the loss is expected to affect California. WORK AND WELFARE, *supra* note 83, at 23.

141. Before JOBS was amended to add participation rate requirements, CBO estimated that 33% of recipients nationwide would participate in an education and training component, with an average annual cost of $2920 per person in 1992. FINANCE COMMITTEE REPORT, *supra* note 40, at 80. The remaining 67% would be in "other work programs," with an average annual cost of $980 per person. *Id.* Using these figures, CBO estimated that JOBS would include an additional 130,000 participants by 1992. *Id.* at 78.

After participation rates were added to the Act, CBO's projections for the total number of participants increased while those for the number in education declined. To reflect the participation rate requirement, CBO added an additional 230,000 participants by 1992. H.R. REP. NO. 998, 100th Cong., 2d Sess. 148, *reprinted in* 1988 U.S. CODE CONG. & ADMIN. NEWS 2776, 2936. These participants are projected to be placed in programs costing two-thirds of the amount that the states currently spend on their work, education, and training programs, translating to $745 per person in 1991. WORK AND WELFARE, *supra* note 83, at 26. This is about 27% of the estimated cost of a JOBS education program and only 80% of the cost previously projected for "other work programs." If 230,000 participants will be in these sub-work programs and 33% of the remaining 130,000 are in education, it follows that about 8% of participants nationwide will be in education programs.

142. At its best, job search may involve preparatory job readiness activities with sessions focusing on how to look for jobs, employer expectations, and job requirements, followed by supervised activities intended to help match participants with available jobs. In instances where there are available jobs and where the participant's difficulty amounts to deficient job-seeking skills, such an activity may increase the likelihood of employment. If, on the other hand, the

where the "experience" received by the participant is that of uncompensated work. "Other work programs" may lead to reduced AFDC participation, often by sanctioning those who do not comply,[143] but it makes little sense to call a state program characterized by such activities an "education and training" program.

Nationwide statistics are likely to create an appearance of more education activity because of the way in which JOBS treats teen parents. States must, with certain exceptions, mandate education for custodial parents under twenty,[144] but states can satisfy this requirement by mandating that the parent return to high school. While this may seem an educational placement for statistical purposes, one would be hard-pressed to argue that a mandate to return to high school constitutes an education program.

CBO's estimates are necessarily uncertain. States could opt for more education and training, but they would have to choose to do so in a federal structure that neither requires nor encourages it. States may find access to untapped community resources or to resources of other programs through improved coordination. But the federal capped amounts and the lack of required state fiscal commitment strongly suggest that the money needed to run a broadly based comprehensive education and training program will not be present in most states.

2. *In View of Limited Resources, States Cannot Afford Universal Programs with Substantial Education and Training Components; States Must Either Limit Participation, Services, or Both*

Because there are not enough resources to provide "education and training" to everyone, the hidden choice in state programs involves the trade-off between the number of participants and the nature of services provided. GAIN initially sought to avoid this choice, through legislation that committed the state to universal implementation and to assuring that each participant received appropriate services. But initial experience has made it clear that, for the foreseeable future, universal implementation of an "enriched" education and training program is not possible with politically attainable resource commitments. GAIN's experience also suggests that state legislative provisions can play a critical role in affecting the choices and trade-offs between participant levels and the nature of services.

When the GAIN statute was first enacted, the legislature envisioned full

problem is that there are no available jobs in the area, or that the individual faces educational or related barriers to employment, an emphasis on looking for jobs is not likely to be very helpful.

143. Illinois operated a mandatory job search program at the cost of $130 to $160 per participant. While it had no statistically significant effect on employment or earnings, the program reduced AFDC participation by sanctioning 15.4% of participants. D. FRIEDLANDER, S. FREEDMAN, G. HAMILTON & J. QUINT, FINAL REPORT ON JOB SEARCH AND WORK EXPERIENCE IN COOK COUNTY viii, xvii, xviii (1987) (available from Manpower Demonstration Research Corporation).

144. *See supra* text accompanying notes 93-95.

implementation throughout California's caseload after two years. This initial commitment to a universal program and full implementation proved impossible to meet on the original schedule, due to the costs noted above. As a result, 1988 state legislation extended the permissible phase-in period from two years to three years and enacted a new and complex system of eliminating GAIN participation for categories of applicants and recipients during, and after, phase-in periods.[145]

Significantly, when costs rose, the state reduced the number of participants rather than the services per participant. Two features of the GAIN legislation explain this result. First, from the beginning, the GAIN statute provided that any county with insufficient funds was to reduce participants rather than services per participant.[146] This legislative mandate prevented the state agency or counties from responding to budget shortfalls by making administrative reductions in the quality or nature of services provided. Second, GAIN's education requirement is mandatory for persons lacking basic literacy or math skills, a high school diploma or its equivalent, or English language skills.[147] The requirement is not contingent on the availability of resources or subject to discretionary exemptions. As a result, a county facing a budget shortfall cannot quietly stop assigning people to educational activities.

In contrast, the FSA lacks any provision to insure that states respond to funding limits by reducing the number of participants instead of services per participant. To the contrary, three structural aspects of JOBS may encourage states to go in the opposite direction of cheap services for many participants. First, participation rates will encourage many states to spread resources very thinly.[148] Second, the Act does not give any individual the right to participate in JOBS; states can choose the participants, subject only to the proviso that, among members of the target groups, first consideration must be given to those who volunteer.[149] Accordingly, some states may seek to discourage participation from those with more expensive needs. Third, the Act has few mandates for what sort of services a state must provide to participants. Even the basic education provisions of the Act are written with sufficient flexibility to allow a state substantial control over the size of this component.[150]

145. CAL. WELF. & INST. CODE § 11320.2(f) (Deering Supp. 1990) (extending the phase-in period); *id.* § 11320.21 (providing for elimination of services to categories of applicants and recipients during, and after, the phase-in period).

146. *Id.* § 11320.2(h) (Deering 1985).

147. *See supra* text accompanying note 116.

148. *See supra* notes 74-76, 142, and accompanying text.

149. *See supra* notes 81-82 and accompanying text.

150. *Compare* FSA § 201(a), 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 2343, 2358 (to be codified at 42 U.S.C. § 602(a)(19)(E)) (effective Oct. 1, 1990) *and id.* § 201(b), 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) at 2363 (to be codified at 42 U.S.C. § 682(d)(2)) (effective Oct. 1, 1990) *with* CAL. WELF. & INST. CODE § 11320.5(b)(6) (Deering 1985).

A state, for example, can reduce the impact of the JOBS education provision for persons age 20 and over lacking a high school diploma either by deferring program participation for such persons, declaring that they already have "basic literacy," or by helping such persons identify career goals that do not require a high school diploma. *See supra* note 92 and accompa-

Apart from structural factors, a political factor may also lead, in many states, to broad participation in cheap services. In 1992, the estimated 360,000 new participants expected to be engaged in a state program will still represent only a small percentage (9.7%) of the 3.7 million families receiving AFDC.[151] Based on this participation level, an estimated 15,000 additional families are projected to leave AFDC in 1992 as a result of JOBS participation.[152] Clearly, this is not a very large number. In view of the extensive rhetoric concerning the transformative nature of the federal legislation, states may feel pressure to have larger participation figures. Unless funding is increased, higher participation will result in lower expenditures per participant.

The FSA does not protect against spreading resources too thinly, but GAIN's experience suggests that states can adopt a number of significant safeguards. First, legislation should set forth clear criteria for when an individual is entitled to enter a particular component.[153] The specific criteria may be subject to political dispute, but they should be explicitly established.

Second, no matter how convinced the state agency may be that there are resources to serve everyone, state legislation should address the possibility that there will not be adequate funding.[154] Without express provisions to address shortfalls, program cuts will be imperceptible, and the quality or mix of program services will deteriorate in ways which are likely to be invisible to anyone but the affected recipients. If a state opts for broad participation in minimal components, that should be a conscious, political decision rather than an inadvertent consequence of poor planning. One approach might be the GAIN-like notion of reducing categories of participants when resources are insufficient; or, if politically viable, it may be appropriate to consider reducing services to particularly remote portions of the state; or legislation might provide for a report to the legislature identifying options.

The trade-off between participation level and services will affect every state and should be addressed before programs begin to operate. Even after initial start-up, clear criteria for determining when a participant enters a component, and how to address funding shortfalls, may help ensure that the legislature squarely faces issues about the nature and direction of the program.

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nying text. Similarly, a state can reduce the impact of the JOBS education provision for custodial parents under 20, by exempting parents under 18 and by finding other assignments more appropriate for 18 and 19 year olds. M. GREENBERG & J. LEVIN-EPSTEIN, *supra* note 103, at 13-14; *see supra* note 95 and accompanying text. Alternatively, some states may simply require such parents to attend high school and then declare that the state has placed them in an educational program.

151. CHARACTERISTICS AND FINANCIAL CIRCUMSTANCES, *supra* note 13, at 14 (table 2).

152. WORK AND WELFARE, *supra* note 83, at 8.

153. This is not to say that the criteria should require the individual to enter the component over her objections. GAIN's experience raises some concerns about use of a rigid requirement for a particular program component.

154. Even though California initially envisioned full implementation for the entire caseload within two years of statewide operation, the implementation legislation still expressly provided that, in case of budget shortfalls, counties would cut participants rather than services.

3. *If Participation Will Be Limited, Establish an Equitable Procedure for Determining Access to the Program*

Because states cannot realistically operate universal programs, they must either enact legislation clarifying which participants have priority, leave the decision to the welfare agency, or leave the decision to individual caseworkers. GAIN addressed this issue by expressly designating an order of entry to the program.[155] The statutory reduction procedures seemed less significant when GAIN was enacted, largely because most people were not envisioning that access would be an issue after implementation. When the gulf between funding and demand became apparent in 1988, the legislature revamped the order of program entry.

Perhaps not all state programs will face a doubling of costs as GAIN did, but a program offering genuine education and training opportunities may have more volunteers than program slots. In such a case, the decision to compel participation for some individuals while denying access to volunteers is problematic.[156] That choice, moreover, means that the program expends scarce funds on compliance and sanctioning activities while others who want access to the program are denied that opportunity. California's legislature did not opt for a volunteers-first structure, at least in part because it mistakenly believed that GAIN would be open to all. The program now denies entry for some volunteers while spending program dollars on sanctioning mandatory registrants. States need to decide whether this is their desired result.

The FSA structure largely leaves to states the issue of volunteer access to JOBS, with one major exception. The legislation provides that in determining priority of participation among target group members, states must give first consideration to those who volunteer to participate in the program.[157] For this provision to be meaningful, state implementation procedures must inform target group members of their priority rights, and provide genuine access to appropriate program services, child care and supportive services when target group members seek to volunteer.[158]

Beyond target group volunteers, states could, but need not, provide a general priority for volunteers. Recent data from GAIN tend to contradict two criticisms typically made of providing a priority for volunteers. First, it is sometimes suggested that volunteers will be those least in need of program services. But at least in early implementation of GAIN, significant percent-

155. *See supra* text accompanying notes 146-47.

156. States are free to run a volunteers-first program under the FSA. The only constraint is that the state must meet the Act's target group requirements (or receive less federal matching funds). *See supra* note 81 and accompanying text. A state may be concerned about meeting target group requirements under a pure volunteers-first approach. This concern, however, can be addressed through monitoring participation demographics, doing appropriate outreach, and if ultimately necessary, departing from a volunteers-first program to the limited extent needed to satisfy target group requirements.

157. *See supra* note 82 and accompanying text.

158. *See supra* notes 99, 102, and accompanying text.

ages of both volunteers[159] and mandatory registrants scored below the cut-off point on the basic skills test.[160] Volunteers were less likely to have been employed in the last twenty-four months[161] and had a lower average hourly wage in their most recent job.[162]

The GAIN data also tends to contradict the claim that exempt volunteers may be less likely to participate responsibly because they face little or no penalty if they begin and then cease participation. GAIN volunteers were more likely to participate in the program and more likely to participate on an intensive basis.[163] And the data raises doubts about whether the threat of sanction is an effective means of eliciting participation by mandatory registrants not

159. Because of differing terminology and changes in law relating to exemptions, "volunteers" under GAIN will not be identical to "volunteers" in JOBS. GAIN only considered an individual a "volunteer" if she was exempt from mandatory requirements, most typically because she was caring for a child under six. In contrast, under the FSA, a volunteer is a person who seeks program access, whether exempt or non-exempt. And, because many parents with young children are now non-exempt, at least a portion of GAIN volunteers would no longer have exempt status.

Despite these differences, GAIN data on volunteers is still useful to get a picture of a population that sought program services at a time when they had no obligation to do so.

160. Over 25% of the volunteers and 30.7% of the mandatory single-parent registrants in eight early implementation counties scored below 215, the cutoff point on GAIN's Comprehensive Adult Student Assessment System test, the standard for measuring the need for remedial English or math. It appears that a significantly higher percentage of volunteers than single-parent registrants may have had high school diplomas, although data is incomplete. Among volunteers, 45.7% had diplomas, 37.3% did not, and there was no information for 17%. In contrast, among mandatory single-parent registrants, 38% had a diploma, 52.1% did not, and there was no information for 10%. J. RICCIO, B. GOLDMAN, G. HAMILTON, K. MARTINSON & A. ORENSTEIN, GAIN: EARLY IMPLEMENTATION EXPERIENCES AND LESSONS 37-39 (table 2.6) (1989) (available from Manpower Demonstration Research Corporation) [hereinafter EARLY IMPLEMENTATION]. Even if volunteers were more likely than single-parent registrants to have a diploma, it still appears that close to half of the volunteers did not have one.

161. Nearly 50% of the volunteers and 54.9% of the mandatory single-parent registrants had been employed in the prior 24 months. *Id.*

162. Volunteers had an average hourly wage of $4.76 on their most recent job, as compared with $5.10 for mandatory single-parent registrants. *Id.*

163. Within six months of registration, 44.9% of the volunteers attended orientation and were active for at least a day, versus 33.5% of the mandatory single-parent registrants. *Id.* at 79 (table 4.1). Volunteers were less likely to attend orientation (34.4% non-attendance for volunteers versus 29.2% non-attendance for single-parent mandatory participants). *Id.* But among those who attended orientation, volunteers were significantly more likely to participate for at least one day within four months of orientation (71.2% of volunteers versus 47.3% of mandatory single-parent registrants). *Id.* at 124 (table 6.1).

As participants, volunteers were significantly more likely to be active for at least 90% of the days they were registered (24.9% of volunteers versus 9.2% of mandatory single-parent registrants) or to be active in at least 70% of the days they were registered (41.8% of volunteers versus 15% of mandatory single-parent registrants). *Id.* at 133 (table 6.3).

In addition to participating more days over time, volunteers participated more hours per week than single-parent registrants, at least as indicated by child care utilization. Volunteers averaged 26 hours of child care utilization per week, whereas single-parent mandatory registrants averaged 19 hours per week during the school year and 22 hours per week during the summer. K. MARTINSON & J. RICCIO, GAIN: CHILD CARE IN A WELFARE EMPLOYMENT INITIATIVE 41 (table 11) (1989) (available from Manpower Demonstration Research Corporation) [hereinafter CHILD CARE]. This difference could, however, be a reflection of the greater child care needs of participants with pre-school children.

otherwise disposed to participate.[164]

Accordingly, the GAIN experience both suggests the virtue of addressing explicitly which groups are given priority for program entry and that volunteers may be both in need of services and likely to participate actively if given the opportunity.[165]

4. *Program Procedures Need to Recognize Circumstances in Which Participation Cannot Reasonably Be Expected*

The FSA divides the recipient population into non-exempt and exempt groups,[166] but does not expressly recognize that non-exempt recipients will often face circumstances that make program participation difficult or impossible. The GAIN legislation acknowledged that in some circumstances a deferral from participation would be appropriate.[167] Data from early implementation indicates the significance of this deferral procedure.

GAIN data indicates that over one-third of the mandatory single-parent registrants who attended orientation were initially deferred from program participation.[168] Over 40% of single-parent orientation attenders were deferred within the four months following orientation.[169] Only a small percentage of those who were initially deferred entered into an activity within four months after orientation.[170]

Three reasons account for nearly 80% of the deferrals among mandatory single-parent registrants: employment for fifteen hours or more per week; a medically verified illness; or a severe family crisis.[171] However, deferrals were also reported for a range of other reasons.[172]

Some deferrals are due to problems such as a severe family crisis, which are best accommodated by an offer of social services. However, the largest

164. As noted above, mandatory registrants participated less frequently and less intensively than volunteers. In a survey of program staff, 30% described financial sanctions as very effective while 32% said they were very ineffective. EARLY IMPLEMENTATION, *supra* note 161, at 177.

165. Given the regulatory definition of "participation," *see supra* notes 74-76 and accompanying text, the GAIN data suggests that a state can more easily meet its necessary participation rates through reliance on volunteers.

166. *See supra* text accompanying notes 61-62.

167. *See supra* note 115 and accompanying text.

168. EARLY IMPLEMENTATION, *supra* note 161, at 141 (table 6.6).

169. *Id.* at 158.

170. *Id.* at 141 (table 6.6).

171. Thirty-nine percent were deferred for being employed 15 or more hours per week, 24.7% for a medically verified illness, and 15.6% for a severe family crisis. *Id.* at 159 (table 7.2).

172. The other reasons for deferral were: 7.3% because of transportation difficulties, 5.5% due to emotional or mental problems, 5.3% because they were in school and had a child under six years of age, 4% because they were temporarily laid off with a call-back date, 3.5% because of legal difficulties, 2.7% because they had no legal right to work in the United States, 2.7% due to lack of child care, and 1.6% for alcohol or drug addiction problems. *Id.* The total number of responses exceeds 100% because registrants could have been deferred more than once for different reasons.

single category for deferral is employment for more than fifteen hours a week. For these employed recipients, it is not clear that they need anything other than to be left alone, unless they affirmatively seek program services.

The Manpower Demonstration Research Corporation [hereinafter MDRC] noted a wide range in deferral rates within and across counties, and a lack of consensus as to when deferrals were appropriate.[173] MDRC also noted that case managers appeared to spend more time locating community resources for deferred registrants in need of help and contacted the registrants on a more regular basis in counties with lower registrant-staff ratios.[174] Conversely, there was less follow-up in counties with higher registrant-staff ratios. More generally, MDRC concluded:

> To the extent that higher participation rates are deemed important, the state and counties should examine the standards for granting deferrals, the duration of deferrals, and the staff resources devoted to monitoring deferrals. However, reductions in the number and duration of deferrals would entail greater costs for monitoring and services.[175]

While it may be accurate to say that fewer deferrals will result in more potential participants, fewer deferrals will not necessarily result in higher participation rates. For example, during a severe family crisis, a person may not be able to participate (and quite possibly should not participate) regardless of her formal status. Similarly, expecting participation from persons already working more than fifteen hours a week may not be very constructive for the individual or the program.

Since the JOBS legislation does not address deferrals, deferral policy choices are made by each state. A reasonable deferral policy may actually help a state meet its participation rate.[176] In any case, GAIN's experience suggests that states envisioning mandatory participation should consider, identify, and codify reasons appropriate for deferral, and not expend limited program resources on persons whose mandated participation is inappropriate.

5. *Take Advantage of Opportunities for Initial Planning and Gradual Implementation*

The GAIN statute included time frames for planning, preliminary data gathering, and gradual implementation. The statute provided two years for

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173. *Id.* at 160.

174. *Id.* at 160-61.

175. *Id.* at xix-xx.

176. Both the statute, FSA § 201(c)(2), 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 2343, 2375 (to be codified at 42 U.S.C. § 603(l)(3)(B)) (effective Oct. 1, 1990), and regulations provide for participation rates to be calculated from a denominator of persons "required to participate" in the program. 45 C.F.R. § 250.74(b)(3) (1989). Those persons who, on a case-by-case basis, have good cause for not participating are excluded from the denominator. 45 C.F.R. § 250.74(b)(4)(ii) (1989).

planning and two years for implementation.[177] The planning process required an assessment of the county's current and projected employment needs, an assessment of participants' needs, an inventory of services available to county residents, and an analysis of the projected unmet service needs, including a plan to develop them.[178]

The GAIN provisions for planning and gradual implementation had two notable effects. First, while a more detailed planning process does not assure a thoughtful program, it is difficult to imagine a very thoughtful program absent such a process. The best hope that a program will involve more than job search and work experience may come from a labor market needs assessment that identifies the educational requirements for future jobs and relates those requirements to the existing skill levels of the recipient population. Examining the needs of the labor market and the circumstances of recipients may at least create preconditions for a more substantial program.[179]

The other significant aspect of gradual implementation is that it allowed for adjustments to the program based on experience gained during implementation. As a result, when the state became aware of a mistake — for example, that 57% of applicants needed education instead of 15% — it was possible to adjust accordingly, without chaotic implications for the program's administration.

The JOBS statute permits gradual implementation and permits, though it does not require, several opportunities for a more extended state planning process. States were not required to begin implementation until October 1, 1990.[180] State JOBS programs need not be statewide until October 1, 1992.[181] States, moreover, had an option to receive matching funds for a comprehensive demographic study of potential participants in the twelve-month period after enactment of the FSA.[182] Each of these provisions gives states an opportunity to start gradually and build on experience and knowledge while moving toward statewide operation. In addition to enhancing the quality of the program, such provisions increase the likelihood that important decisions affecting welfare policy will not be made *sub silentio*.

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177. *See supra* text accompanying notes 112-13.

178. CAL. WELF. & INST. CODE § 11320.2(b) (Deering 1985).

179. One of the more ambitious labor market needs assessments was conducted by Los Angeles County. The assessment was used to identify jobs anticipated to grow by 1992 which paid at least 185% of the AFDC grant for a family of three. These jobs were evaluated by considering such factors as educational requirements, opportunities for part-time work, and unemployment rates. *See* GAIN LABOR MARKET NEEDS ASSESSMENT (California State University 1987).

180. FSA § 204(a), 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 2343, 2381 (to be codified at 42 U.S.C. § 681) (effective Oct. 1, 1990).

181. *Id.* § 201(b), 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) at 2361 (to be codified at 42 U.S.C. § 682(a)(1)(D)) (effective Oct. 1, 1990).

182. The study had to be performed between October 1988 and October 1989. *Id.* § 201(b), 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) at 2372 (to be codified at 42 U.S.C. § 686(a)).

6. *Recognize that Some Participants Will Prefer Other Activities to Basic Education*

At the time of its enactment, GAIN's most distinctive feature may have been its broad provision for the remedial education of recipients lacking basic reading and math skills, a high school diploma, or English language skills.[183] The law required that basic education must be the initial component for such recipients.[184] While advocates generally may assume that basic education must necessarily be preferable to non-education program components, the initial GAIN experience suggests some important qualifications.

In GAIN's participation sequence, an individual found to need remedial education was required to participate in that activity before receiving a detailed assessment or an opportunity to participate in vocational education or training. Initial results of longitudinal tracking suggest two potential problems with this approach: 1) some people do not want to attend remedial education, and 2) many people may never get to the vocational education/ training stage.

MDRC tracked a sample of GAIN registrants for a period of months in eight early implementation counties.[185] The results indicated that registrants found in need of basic education were less likely to participate in GAIN than those not found to need basic education.[186] Moreover, discussions with field staff in counties, some of which had comprehensive orientation procedures and some of which had more mechanical orientation procedures, led MDRC to observe that "[s]taff in both sets of counties often reported in field interviews that many registrants resisted job search and basic education services and wanted vocational training instead."[187] Additionally, after beginning basic education, a substantial portion of participants left without completing program requirements, usually within a month.[188]

MDRC notes a "widely shared view among GAIN staff . . . that registrants would be better motivated if basic education curricula and activities were more strongly linked to vocational objectives and activities."[189] Many staff and administrators expressed a strong interest in operating concurrent

183. *See supra* text accompanying note 115.

184. By regulation, the California Department of Social Services permits recipients who would be subject to the basic education provisions to opt for three weeks of job search before entering education. DEPARTMENT OF SOCIAL SERVICES, *supra* note 115, § 42-772.53.

185. EARLY IMPLEMENTATION, *supra* note 161.

186. Among single-parent mandatory registrants, 41% of those found in need of basic education participated in GAIN, versus 48% of those not found to need it. *Id.* at 130. Among registrants in AFDC-UP families (typically male parents), 43% of those found to need basic education participated in GAIN, whereas 53% of those found not to need education participated. *Id.* at 130 n.10. From its discussion with field staff MDRC reported "that men, particularly those who had held jobs and had not been in the classroom for years, were among those having trouble accepting the requirement." *Id.* at 209.

187. *Id.* at 156.

188. Within a four-month follow-up period, roughly one-third of the mandatory single-parent students left basic education without completing the requirements. *Id.* at 207.

189. *Id.* at 210.

basic education and vocational training programs.[190]

At the four-month follow-up point, some recipients had successfully completed a basic education component.[191] But no one who began in basic education had gotten to the point of receiving any vocational training.[192] Of orientation attenders who were found to need basic education, less than one-third actually participated, and over one-third of those who began participation left without completing the component.[193]

This data may only reflect the number of instances in which deferral situations are appropriate as well as the normal caseload dynamics of the AFDC program.[194] But at minimum, it raises questions about a program sequence in which access to vocational training does not occur until a point where many registrants are no longer participating in the program. To some extent, this may suggest the broader problem of trying to structure a planned sequence of activities, when the sequence will only be available if the individual happens to retain AFDC eligibility. It is premature to draw conclusions about whether GAIN participants will ever receive vocational training in significant numbers, but it seems likely that the best way to ensure access is to avoid a structure where there are substantial preliminary hurdles to the vocational training.

The JOBS structure offers several ways to avoid a mandatory remedial education bottleneck. Among participants twenty and over without a diploma, the state must provide basic education unless the individual either has basic literacy or an employability goal that does not require a diploma.[195] But the state may offer vocational training or job readiness activities simultaneously with basic education, so long as the activities do not interfere with the basic education. Particularly in states with lower grant levels, where it may be exceedingly difficult for a family to survive on AFDC while proceeding through an extended education/training sequence, it may be important to provide for the possibility of concurrent activities. For recipients opposed to receiving basic education, the state need not require it, so long as the state

190. *Id.* at 212.

191. Completion rates were significantly better at the six-month point than at the four-month point. At four months, the completion rate for Adult Basic Education was 9%; the completion rate for those in GED classes was 15%; and the completion rate for those in ESL classes was 5%. At six months, the completion rate for Adult Basic Education was 25%; the completion rate for those in GED classes was 21%; and the completion rate for those in ESL classes was 20%. *Id.* at 207 n.30.

192. *Id.* at 140 (table 6.6). For the program as a whole, only .5% of the mandatory single-parent registrants who attended orientation reached a stage of post-assessment education or training within four months of orientation. *Id.* at 124 (table 6.1).

193. *Id.* at 192 (figure 9.1).

194. A study examining caseload dynamics concluded that the median length of a period of receipt of AFDC in California was nine months for single-parent families and six to seven months for AFDC-UP families. D. MAXWELL-JOLLY & P. WARREN, CALIFORNIA'S WELFARE DYNAMIC 13 (table 5) (1989) (jointly published by Senate Appropriations Comm. and Joint Oversight Comm. on GAIN Implementation, State of California). About half of all recipients who leave AFDC return over the course of the three years following the exit. *Id.* at 16.

195. *See supra* note 92 and accompanying text.

ensures that the individual's long term employability goal really does not require a diploma.

7. *Anticipate No Dramatic Effects at the Program's Inception*

There may be no dramatic results in the initial implementation stages of a program which seriously addresses educational deficits. An analysis of data from GAIN's first sixteen months of operation, during which 54,756 people had been registered, shows that only 3,107 persons became exempt from GAIN because of employment while 1,968 were terminated from aid because of employment.[196] One would expect at least this degree of employment-related activity even if there were no GAIN program.[197] In fact, at least initially, a program like GAIN may reduce the number of people leaving welfare as the result of employment precisely because it is providing education and supportive services.

The early and fragmentary data from California suggest that a longer time frame is needed. Unfortunately, the only available data on employment activity comes from monthly reports stating the numbers of families with reduced grants or grant terminations resulting from employment. A grant reduction means that even with the new job, the family is still within AFDC's financial eligibility standards, so it suggests either part-time work or a very low hourly wage.[198] For the first nine months of fiscal year 1987-88, 939 recipient families participating in GAIN were terminated and 2,930 had their grants reduced as a result of employment.[199] While these figures reflect an accelerated pace from earlier performance, they are still far from impressive, particularly in light of the fact that two-thirds of the employment placements were with such low-paying jobs that they did not result in AFDC ineligibility. Indeed, in a state with lower AFDC payment levels, such employment might lead it to AFDC ineligibility but still leave the family deep in poverty.

GAIN's slow improvement rate suggests the need for more modest expec-

196. C. MCKEEVER, SIXTEEN MONTHS OF GAIN: TROUBLING TRENDS 2 (table 1) (1988) (available from Western Center on Law & Poverty) [hereinafter SIXTEEN MONTHS OF GAIN].

197. By way of comparison, one can consider the experience of the control group when San Diego County operated a Job Search/Work Experience Demonstration Project for AFDC applicants in 1982 and 1983. Of applicants going through a job search program, 60.5% were employed at some point during the five-quarter follow-up; 61% of those receiving both job search and a workfare requirement were employed at some point during the five-quarter follow-up; and 55.4% of the control group were employed at some point during the five-quarter follow-up. B. GOLDMAN, D. FRIEDLANDER & D. LONG, FINAL REPORT ON THE SAN DIEGO JOB SEARCH AND WORK EXPERIENCE DEMONSTRATION xv (1986) (available from MDRC).

198. For example, a mother and one child in California with no other income got an AFDC grant of $511 per month in January 1988. If the mother got a job paying $4.25 per hour, and the mother received all possible AFDC earnings deductions, she would have been ineligible for AFDC after the first four months of employment. *See* CHARACTERISTICS OF STATE PLANS, *supra* note 11, at 373.

199. CALIFORNIA DEP'T OF SOCIAL SERVICES, GAIN MONTHLY ACTIVITY REPORT 25 (1988).

tations about the JOBS program's probable short-run effects. There is a tension between the desire for quick results and the severity of the educational deficits facing many recipients. If people expect that the creation of the state program will lead to immediate changes in employment-related behavior, the initial results of an education-based program component will most likely disappoint them.

The lack of early, dramatic results may pressure a state agency toward wider participation and cheaper services. GAIN's experience suggests that broad educational requirements will not advance a goal of quick results, at least if those results are just measured in terms of employment rates. If a program is going to have a significant educational component, then there should be no promises of immediate transformative results, and measurements of program success must be broad enough to acknowledge educational attainments as an indicator of success.

8. *Recognize that a Formal Guarantee of Child Care Is Not Sufficient Without a System to Assure Provision of Care*

GAIN's experience suggests that even strong legislative language providing an entitlement to child care is not sufficient to ensure child care for participants. In many respects, the GAIN legislation had extensive child care protections. The law provided that "[p]aid child care shall be available to every participant with a child under twelve years of age who needs it in order to participate in the program component to which he or she is assigned."[200] Child care would be provided at the regional market rate.[201] Counties, moreover, had an affirmative duty to assist participants to locate child care, to allow and promote parental choice by providing flexibility in child care arrangements and payment arrangements, and to assist in the development of new child care capacity.[202]

Despite the assured funding and the statutory promises, child care utilization among GAIN participants has been far less than anticipated. In fiscal year 1987-1988, $20 million was allocated for GAIN child care, and expenditures only totalled $7 million; in response, California asked MDRC to examine child care utilization in early implementation counties.[203] The results of the study offer some potential lessons for other states but raise some still unanswered questions.

As one part of the explanation for low utilization, MDRC found that only one-fourth of mandatory single-parent GAIN registrants had a child under twelve and participated in a GAIN activity when their child was not in school.[204] Accordingly, many registrants did not need a child care arrange-

200. CAL. WELF. & INST. CODE § 11320.3(e)(1) (Deering 1985).

201. *See supra* note 127 and accompanying text.

202. CAL. WELF. & INST. CODE § 11320.3(h) (Deering 1985).

203. CHILD CARE, *supra* note 164, at 1.

204. In a sample of mandatory single-parent registrants, 79% attended orientation; 55% had a child under 12; 36% had a child under 12 and participated in a GAIN activity after

ment. But among the mandatory registrants who used a child care arrangement, less than half used GAIN funds to pay for that arrangement.[205] Among volunteers, about two-thirds of those with a child care arrangement relied on GAIN funds to help pay for that arrangement.[206]

The low utilization of GAIN funds among those with child care arrangements can be explained in part, but only in part, by county failure to convey effectively information about the right to GAIN child care. In a survey of mandatory registrants who had a child care arrangement not paid for by GAIN, 68% reported they knew GAIN would pay for care provided by family and friends, and 77% knew GAIN could pay for center care.[207] While this data suggests that a number of people who "knew" GAIN would pay for child care did not rely on GAIN funds, the survey data does not convey what the affected recipients truly understood about their rights.

Whether or not recipients believed GAIN would pay for child care, they did not appear to understand typically that their participation in GAIN could not be required if child care was unavailable. In the broader population of mandatory registrants who did not have a child in school all day and who participated in a GAIN activity, 84% remembered being informed that they could get help in finding child care, 74% that GAIN would pay for child care by family members and friends, and 80% that GAIN would pay for licensed care.[208] But only 19% of these recipients recalled being told that they would not have to participate in GAIN if they could not find child care.[209]

MDRC identified a few clear differences between those who did and did not use GAIN funds for their child care arrangements. There was no substantial difference in the average age of youngest child of those who did and did not use GAIN to pay for their child care, but those who used GAIN funds had more hours of child care per week in their most recent program activity.[210] Those using relatives were less likely to use GAIN funds, and those using day care centers were most likely to use GAIN funds.[211]

Unfortunately, the MDRC survey did not directly ask those who had a care arrangement not paid for by GAIN why they were not using GAIN funds. In addition to a lack of understanding of child care rights, MDRC

orientation; 24% used a child care arrangement while participating in a GAIN activity; 11% participated in an activity while their child was in school; and 1% participated in an activity while their child was not in school, but without any child care arrangement. *Id.* at 19 (figure 4).

205. While 24% participated in GAIN with a child care arrangement, only 10% used GAIN child care funds. *Id.*

206. Voluntary registrants will most frequently be those who are exempt from GAIN because they have a child under six. Of the 58 voluntary registrants in the MDRC study who participated in a GAIN activity, almost all (56 of 58, or 96%) had a child care arrangement, and 39, or 67%, used GAIN funds for that arrangement. *Id.*

207. *Id.* at 56-58.

208. *Id.* at 30 n.33.

209. *Id.*

210. *Id.* at 54 n.47.

211. The relevant percentages were 39% for relative care, 60% for non-relative care, and 75% for center-based care. *Id.* at 57 (table 18).

identifies a number of possible reasons why participants with care arrangements did not use GAIN payments: that GAIN was usually a part-time commitment; that complying with necessary paperwork may have been inconvenient; that the care may have been provided at no cost; that at some points, counties were prohibiting the use of funds for care in the participant's own home; and that during early implementation, some counties may not have had effective payment systems in operation.[212] Each of these factors may have played a role, but it still seems that lack of effective understanding may be the primary factor. While it is true that GAIN was usually a part-time commitment, mandatory registrants on average required nineteen hours of child care per week during the school year and twenty-two hours per week during the summer,[213] certainly enough to make a paid arrangement attractive and to make it worthwhile to complete the necessary paperwork (particularly if the caseworker provided help as required). Statistics do not indicate the percentage of arrangements that were unpaid, but the recipient was *entitled* to get pay for the caretaker, and it is hard to see why someone would turn down free money.[214] Even at a later point, when policy issues about payment for in-home care had been resolved and payment systems had been better established, utilization rates did not increase.[215]

The importance of assuring safe and appropriate child care arrangements is underscored by survey data about child care problems faced by recipients. MDRC found that 17.9% of a sample of respondents who participated in GAIN experienced child care "problems," most often listed as difficulty finding a reliable provider, payment difficulty, difficulty finding a provider to meet the GAIN schedule, and difficulty finding quality care.[216] 21.5% of the respondents missed GAIN time because of no provider or an unavailable provider and 4.8% did so six or more times. 11.9% of the respondents (and 15.6% of the mandatory registrants) left a child under twelve at home without a babysitter in order to participate in GAIN; 4.8% of the mandatory registrants indicated they did so frequently.[217]

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212. *Id.* at 56-58.

213. *Id.* at 41 (table 11).

214. MDRC suggests that when the caretaker was an AFDC recipient, she might not have wanted to be paid, because the amount would count against the grant. *Id.* at 56. But since the first $75 of earnings was disregarded as a work expense deduction during the time of the study, *see supra* text accompanying note 29, a limited payment would clearly be in the caretaker's best interest, and even a more substantial payment would leave the caretaker financially better off than no payment at all.

215. CHILD CARE, *supra* note 164, at 58.

216. *Id.* at 52-53 (table 16).

217. *Id.* The magnitude of this problem is understated by the polling universe used. MDRC used a sample of those participating in GAIN, whether or not they had a child care arrangement. But over half of the mandatory registrants did not have a child care arrangement during the school year. *Id.* at 38 (table 9). Presumably, a participant would not need to leave her child unattended if her activities were scheduled to correspond to her child's school hours. One would anticipate that the frequency of leaving children home alone was greater among participants whose activities were scheduled, at least in part, at times when their children were not in school.

The evidence of children being left home alone casts doubt on the adequacy of explanations like "inconvenience" or "availability of free care." Whether or not respondents remembered that GAIN would assist with child care, the implication seems clear that a significant number of participants did not fully understand their child care rights in the program.

The sense that some mandatory registrants were attempting to get by with make-shift care arrangements is reinforced by examining patterns of utilization of care by mandatory registrants during the school year and during the summer. Over half of the mandatory participants had their GAIN activities while their children were in school.[218] But during the summer, use of relative care tripled,[219] and 5% of participants allowed their children to care for themselves during the summer.[220] Moreover, 15.5% used a provider under eighteen during the summer, and 2.8% used a provider age fourteen or younger.[221] In total, one-fifth of all mandatory participants were using either a provider under eighteen or no provider at all during the summer.

Finally, the MDRC data raise some concern about the effects of parental participation without child care for older children. The entitlement to GAIN child care terminated when a child turned twelve. MDRC's survey found that one-third of those with a child between the ages of twelve and fourteen said that their child was on her own without supervision after school or when school closed. Forty percent of the respondents said that this situation caused problems or worries.[222] Regardless of the scope of the child care guarantee and the availability of federal matching funds, under JOBS, states will need to determine whether it is desirable to leave these children without a supervised setting during their parents' JOBS participation.[223]

At the simplest level, the MDRC data might suggest that states structuring their programs can anticipate low child care utilization rates. However, there are three reasons why that is not the best conclusion to draw from the data.

First, more parents with younger children will participate in JOBS. In GAIN, parents with children under six were exempt.[224] As states implement JOBS, the universe of mandatory participants will extend to recipients with very young children and to teen parents with infants.[225] The experience with

218. The precise percentage is 54.6%. *Id.*

219. Relative care utilization increased from 17.3% to 52%. *Id.*

220. During the school year, 2.9% allowed their children to care for themselves. *Id.*

221. *Id.* at 39 (table 10). During the school year, 5.5% of the mandatory registrants and 1.6% of the voluntary registrants used a provider under 18.

222. Sixty-nine percent expressed concern that their children could not be trusted, 38% expressed concern about safety, and 13% expressed fear of crime. *Id.* at 54 n.46.

223. The FSA does not address any age limit for the child care guarantee, but regulations limit the guarantee to children who are under 13, and to children 13 and over who are physically or mentally incapable of caring for themselves (as verified by a physician or psychologist), or under court supervision. 45 C.F.R. § 255.2(a) (1989).

224. *See supra* note 111.

225. *See supra* notes 64-68 and accompanying text.

GAIN volunteers, who typically had children under six, may be telling in this regard.[226] Unlike mandatory registrants, virtually all volunteers used a child care arrangement.[227] Moreover, among participants with child care arrangements, volunteers were significantly more likely to use GAIN funds,[228] and they were more likely to use more formal care arrangements.[229] These factors could lead to greater overall utilization under JOBS.

Second, the GAIN data suggest that the more hours a participant was in the program, the more likely the participant was to use a program-paid child care arrangement.[230] HHS regulations require a group of individuals to participate for an average of twenty hours or more per week to meet JOBS participation rates.[231] Thus, an increase in participation intensity might increase child care utilization as well.

Finally, the MDRC statistics raise the possibility that a state experiencing low utilization should be concerned rather than relieved. While low utilization may reflect, in part, a choice to get by with other arrangements, it also partially reflects unstable, inadequate, or non-existent child care. If a state wishes to avoid this result, the state needs to establish a system with safeguards to assure that families that would benefit from child care assistance receive that assistance.

States certainly need to focus on worker training, orientation procedures, and recipient access to information about child care rights and choices. But the GAIN experience suggests the possibility of a difference between informing recipients and effectively conveying choices. It also suggests that states need to create a management information system that will at least identify why a recipient who is entitled to receive child care does not receive it. Such a system would offer an early warning of difficulties such as the failure of caseworkers to inform recipients of their rights, the failure of recipients to

226. It is impossible to draw direct conclusions from the experience of GAIN volunteers, because those who volunteer may have different characteristics from the general pool of recipients with young children. There is reason to expect higher utilization among volunteers, since an express reason for volunteering could be to attain access to the program's child care assistance. CHILD CARE, *supra* note 164, at 31.

227. Ninety-seven percent of the volunteers who participated in GAIN used a child care arrangement, versus 66% of mandatory registrants. *Id.* at 36 (figure 7).

228. Forty-four percent of the mandatory registrants who used child care arrangements drew on GAIN funds, versus 69.5% of the voluntary participants. *Id.* at 34.

229. Nearly 48% of the volunteers used licensed care arrangements, versus 10.9% of the mandatory registrants during the school year and 15% of the mandatory registrants during the summer. *Id.* at 38 (table 9).

230. *Id.* at 54 n.47.

231. *See supra* note 75. MDRC's data regarding hours of participation in GAIN do not give sufficient information to make a comparison to the JOBS program. While the data indicate an average utilization of child care during participation of 19 hours per week by mandatory participants during the school year, CHILD CARE, *supra* note 164, at 41 (table 11), the average does not tell how many people actually participated at that level. For example, if one registrant participated 28 hours per week and another participated 10 hours per week, they would average 19 hours per week, but only one of the two might need child care.

understand their rights, and recipients' fears about utilizing program-paid care.

States also need to devote resources to planning for the periods of the year when school is not in session. Perhaps the clearest pattern in the survey is that of very informal child care arrangements during the summer break. To prevent this result, child care alternatives need to be structured in advance of the summer.

Finally, the GAIN data make clear that enacting strong legal entitlements is not sufficient to ensure the substantive result of child care for all participants in need. Absent a feedback and adjustment mechanism, significant numbers of recipients do not receive child care even where they have a clear statutory entitlement.

The JOBS child care guarantee largely leaves to the states the issues of how child care is provided.[232] At the start of its program, a state will most likely focus on the issue of payment rates. GAIN's experience suggests, however, that this is only one factor that affects what child care the participants actually get. States need to devote substantial planning resources to developing procedures to inform recipients of their options, to assure the availability of genuine choice, and to find out what happens when care is not provided.

9. *Transitional Child Care Is Important and Will Not Be Provided Without an Adequate System*

Under the FSA, states must implement a transitional child care system providing for up to a year of continuing child care assistance for families who lose AFDC eligibility because of employment.[233] If a low-wage single parent worker is to have any realistic hope of maintaining stable employment, a source of continuing child care assistance is essential. GAIN has operated with a system of three months of transitional child care to program participants who leave AFDC due to employment.[234] A review of MDRC's study of child care utilization raises substantial concern over whether eligible recipients will receive transitional child care and what happens when they do not.

GAIN participation statistics indicate that only a fraction of the families terminated from aid as a result of employment received transitional child care.[235] In eight counties MDRC's child care utilization survey found that, among those who left AFDC due to employment, 17% of the mandatory registrants and 24% of the voluntary registrants used GAIN transitional child

232. *See supra* notes 99-101 and accompanying text.

233. *See supra* note 104 and accompanying text.

234. Transitional child care under the FSA is broader in scope because it is not limited to those who obtain employment while participating in JOBS. Rather, it is potentially available to all AFDC recipients who lose AFDC due to employment (and meet other eligibility conditions). *See supra* note 104.

235. In the first 16 months of GAIN, of 650 single-parent families terminated from aid as a result of employment, only 44 received three months of transitional child care. SIXTEEN MONTHS OF GAIN, *supra* note 197, at 4.

care funds,[236] even though the vast majority of both groups reported using a child care arrangement in their most recent job.[237]

While patterns of child care arrangements for employed former AFDC recipients were similar to those for GAIN participants in general, there are several important and potentially disturbing differences. First, employed former AFDC recipients more frequently relied on relative care during the school year.[238] Second, the children of employed former AFDC recipients were more likely to be caring for themselves during the summer and during the school year.[239] Third, employed individuals who had been GAIN mandatory registrants were more likely to rely on children under eighteen as caregivers when working.[240]

Here, the failure to inform employed former AFDC recipients of their rights is clearly a factor in the underutilization of transitional child care. Only 44.5% of registrants in the MDRC survey recalled being told that GAIN would pay transitional care.[241] Among mandatory registrants not using transitional child care, 31.9% said they did not need it, 29.2% said they did not know about it, 9.7% said they did not qualify for it, 12.5% said they did not want it, and 12.5% offered "other" responses.[242] But these responses are not

236. Twelve percent of the mandatory registrants left AFDC due to employment, and 21% of the voluntary registrants did so, but only 2% of the mandatory registrants used GAIN transitional child care funds, and 5% of the voluntary registrants did so. CHILD CARE, *supra* note 164, at 21 (figure 5).

237. Seventy-eight percent of the mandatory registrants and 98% of the volunteers reported using child care arrangements in their most recent job. *Id.* at 22 n.30. Only 40.5% of the mandatory registrants could structure their work hours to occur while their child was in school, as compared to 54.6% whose GAIN activities occurred while their child was in school. *Compare id.* at 64 (table 20) *with id.* at 38 (table 9).

238. While 28.7% of the employed recipients who previously had had mandatory status in GAIN relied on relative care, only 17.3% of the GAIN mandatory participants did so. *Id.*

239. Of the employed individuals who had had mandatory status in GAIN, 12.5% relied on their children caring for themselves during the summer, and 5.9% during the school year. In comparison, 5% of mandatory GAIN participants relied on their children taking care of themselves during the summer, and 2.9% during the school year. *Id.*

Of children between nine and 11 years old, 13.9% cared for themselves while their parents were employed (versus 7% while their parents participated in GAIN), and 1.9% of children ages six through eight cared for themselves while their parents were employed. *Id.* at 66 (table 22).

Twenty-two percent of the employed parents who had had mandatory status, and 5.9% of the employed parents who had had voluntary status, reported they left a child under 12 at home without a babysitter while working; 10% of the employed parents who had had mandatory status said they did this regularly. *Id.* at 73 (table 25).

240. The employed parents who had had mandatory status relied on children under 18 as caregivers in 15.7% of cases during the school year (of which 5.2% involved care provided by a child 14 or under) and in 22.6% of the cases during the summer (of which 9% involved care provided by a child 14 or under). *Id.* at 65 (table 21). Of respondents whose children cared for themselves, fewer than half reported being told GAIN paid for transitional care. *Id.* at 67.

By comparison, only 5.5% of the mandatory participants in GAIN used a provider under 18 during the school year, and only 15.5% in the summer. In the summer, only 2.8% used a caregiver 14 or younger. *Id.* at 39 (table 10).

241. *Id.* at 29 (table 6).

242. *Id.* at 75 (table 26). The comparable responses for those whose GAIN status had

very informative without knowing, for example, why a person "did not need" or "did not qualify" for the care. Again, it is difficult to identify any reason why an informed person with preschool children or hours of employment including time children are out of school would decline three months of free or subsidized child care assistance.

MDRC suggests that possible explanations include the use of free care, the fact that a child may have been in school during work hours, the failure of workers to inform adequately individuals of their rights, and non-uniform interpretations of policy (although utilization rates did not improve in a later survey).[243] MDRC also suggests that, in some instances, recipients may not have informed their caseworkers of employment.

Perhaps the clearest indication that the problem flowed from inadequate information regarding the availability of transitional child care comes from comparing utilization rates during and after GAIN participation by voluntary registrants. About two-thirds of the voluntary registrants with child care arrangements relied on GAIN payment during GAIN participation; in contrast less than one-fourth of the voluntary registrants with child care arrangements relied on GAIN payment for the transitional period.[244] Had all participants known that they were still eligible for child care benefits after they began working, surely more would have taken advantage of these benefits.

Apart from the failure to inform, one structural problem in the relation between employment and AFDC eligibility may have led to the drop off in use of child care. Because the major AFDC earning disregard expires after four months, some recipients obtaining employment may continue to receive AFDC for the first four months of employment. When the disregard expires, the family often loses AFDC eligibility. However, when the recipient began working, she typically stopped participating in GAIN and could only rely on the AFDC child care disregard to fund her child care expenses. After losing AFDC eligibility, she could seek three months of transitional child care assistance. In this structure, a recipient might have child care assistance while in GAIN, lose it for the first four months of employment, and then be eligible to reapply after losing AFDC eligibility. GAIN participants who obtained part-time employment may have faced this situation.[245]

Three points become clear from looking at the GAIN experience. First, absent some system to ensure that eligible persons actually receive transitional child care assistance, utilization rates will likely be very low. Second, the state system needs to provide for continuity of care between program participation, employment while receiving AFDC, and employment after receiving AFDC.

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been voluntary were 25% who said they did not need transitional child care, 10% who said they did not know about it, 27.5% who said they did not qualify for it, and 17.5% who gave "other" responses. No respondents said they did not want transitional child care. *Id.*

243. *Id.* at 76.

244. *Compare supra* note 207 and accompanying text *with supra* note 237 and accompanying text.

245. *See supra* text accompanying note 200.

Third, without assistance, participants obtaining employment are more likely to rely on unstable, inadequate, or nonexistent child care. To avoid these results, states must develop systems which will effectuate the formal right to transitional care.[246]

10. Do Not Rely on the Fair Hearing System as the Primary Means to Protect Participants' Rights

Supporters of mandates in work-welfare programs often point to the existence of a fair hearing system as a means of preventing abuses and ensuring that recipients can exercise their rights to statutory entitlements. A review of the fair hearing decisions in the first twenty months of GAIN casts doubt on the extent to which fair hearings provide a sufficient safeguard.

The first and most striking point is that during a time when over 50,000 people had been registered for GAIN,[247] there were only fifteen GAIN hearing decisions.[248] Thus, at least in its early operation, there was almost no use of the fair hearing process to resolve disputes about the GAIN program.

Claimants who used the hearing process had some degree of success, winning six of the decisions. But the decisions are not evenly dispersed among the counties operating GAIN programs. More than half of the decisions (eight out of fifteen) come from two counties.

Of the fifteen decisions, seven were sanction-related; the remainder involved affirmative attempts of claimants either to affect program participation or to seek reimbursement of expenses for activities prior to the GAIN contract. Three decisions concerned whether a county has a duty to reimburse a claimant for child care expenses incurred before the day that she signed her GAIN contract.[249] One decision concerned whether a claimant could be required to participate in remedial math classes,[250] and one concerned whether a claimant could be required to attend a job club.[251] Others concerned the

246. HHS regulations provide that a family must "request" transitional care, but otherwise the details of the application process are left to each state. 45 C.F.R. § 256.2(b)(3) (1989).

247. *See supra* text accompanying note 197.

248. The hearing decisions were provided in response to a request to the State Department of Social Services and are on file with the author.

249. The hearing officers held that the county has no such duty. In one instance, a claimant incurred child care costs of $65 per week and traveled 56 miles a day to school under the belief that the expenses would be reimbursed through GAIN. She testified, and it was not disputed, that her eligibility worker told her GAIN would reimburse her. As a result of the county's delays in starting the program, however, there was a four-month wait before she could get an appointment with the GAIN worker to sign the GAIN contract. The eligibility worker refused to assist her in getting the GAIN appointment. The Director ruled that since she had not signed the GAIN contract at the time she incurred the expenses, she was not entitled to reimbursement. Santa Clara County, California State Hearing No. 43-809430 (Dep't of Social Services Feb. 16, 1988).

250. The claimant asserted that he did not need remedial math since he was trying to gain employment as a light truck driver. Alternatively, he sought permission to take the math test again. His claim was denied. Santa Clara County, California State Hearing (Dep't of Social Services Sept. 14, 1987).

251. The decision held that the claimant was required to go to the job club notwithstand-

county's failure to notify a claimant of her exempt status,[252] a county's refusal to let a volunteer participate,[253] and a county's refusal to let a participant renegotiate a contract after the three-day period for contract reconsideration had passed.[254]

With such a small sample, it is not possible to reach broad conclusions about GAIN-related problems. It is theoretically possible that these are the only individuals who were not able to resolve problems informally, but the more likely explanation is that recipients simply did not use the fair hearing process to raise concerns about program operation.

For many disputes likely to arise in JOBS, the fair hearing process is inherently unworkable. Under federal law, states may take up to ninety days to decide fair hearings.[255] When a dispute involves issues such as whether a recipient must attend a program component or whether an alternative component may be made available, a more rapid and simpler resolution of the issues is essential. California recognizes the need for an alternative to fair hearings by providing for formal grievance procedures to be operated by each county.[256] There are no available statistics on the extent these procedures are used.

In JOBS, each state must establish a conciliation procedure for the resolution of disputes prior to fair hearings.[257] The GAIN experience suggests the need for an effective conciliation procedure both because the fair hearing process is far too slow to resolve most day-to-day disputes and because the fair hearing system may go virtually unused.

The limited use of the fair hearing process also suggests the need for alternative management tools to allow states to evaluate a program's operations.[258] In some circumstances, fair hearing decisions can provide an effective vehicle for program administrators to gain information about the day-to-day opera-

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ing her claim that she was already conducting her own job search and might miss calls from potential employers while absent. Stanislaus County, California State Hearing No. 30-201034 (Dep't of Social Services Sept. 11, 1987).

252. Santa Clara County, California State Hearing No. 50-30-0191174-1 (Dep't of Social Services Mar. 11, 1987).

253. Santa Clara County, California State Hearing No. 87040107 (Dep't of Social Services Apr. 24, 1987).

254. The decision held that when the three-day period to reconsider the contract ended on Friday, and the client contacted the county seeking reconsideration on Monday, the county correctly refused to reconsider the contract. Santa Clara County, California State Hearing (Dep't of Social Services Nov. 9, 1987).

255. 45 C.F.R. § 205.10(a)(16) (1989).

256. CAL. WELF. & INST. CODE § 11320.65 (Deering 1985).

257. FSA § 201(b), 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 2343, 2367-68 (to be codified at 42 U.S.C. § 682(h)) (effective Oct. 1, 1990); 45 C.F.R. § 250.36 (1989).

258. This point has implications beyond the JOBS program. Most states simply do not receive enough fair hearing requests to formulate a meaningful picture of a program's operation. In fiscal year 1986, there were a total of 142,624 fair hearing requests in the nation. More than 60%, 87,512, came from New York and California. Twenty-seven states had less than one hundred hearing requests. U.S. DEP'T OF HEALTH & HUMAN SERVICES, QUARTERLY PUBLIC ASSISTANCE STATISTICS, FISCAL YEAR 1986, at 100-01 (table 82) (1986).

tion of local programs. They offer a description of the conduct to which applicants and recipients have most strongly objected. When recipients rarely resort to the process, however, its utility as a management tool is minimal. Accordingly, states must consider alternative sources of information that will provide a clear picture of a program's operation. For states developing conciliation procedures, it may be appropriate to ensure that information about the substance and results of conciliation flows upward to management, in order for management to get a better idea of the program's actual shortcomings.

11. Maintain a Data and Evaluation System that Gives a Clear, Ongoing Picture of the Program's Results

GAIN has opted for a comprehensive set of evaluation studies to be conducted by the Manpower Demonstration Research Corporation. As suggested herein, the interim MDRC studies have been invaluable sources of program information. Unfortunately, the major study of actual program impacts, benefits, and costs will not be available until 1992.[259] While awaiting that study, program observers are often forced to rely primarily on the minimal data reported each month by California's counties.[260]

Gross participation data does not help answer many of the most important questions about the program. It does not relate recipient characteristics to services received. It does not tell which recipients are not receiving supportive services, or why they are not receiving them. It does not convey the nature of employment attained, retention rates for employment, or the impact of receiving employment on family income. Nor does it relate which program components are associated with attaining what kind of employment.

Data collection is often a dry issue until one has a question about program operation. California advocates were aware that only a fraction of apparently eligible people were receiving GAIN child care and transitional child care long before MDRC's study. However, none of the routine county data reporting gave any indication of why utilization was so low.

Apart from offering a better picture of program operation, carefully constructed data requirements might even affect worker behavior. For example, if workers who were not paying for a participant's child care had to record why the care was not being provided, the workers might be more likely to discuss the matter with affected participants.

Improved data collection might also help in the next round of welfare reform debates. The Department of Health and Human Services' failure to mandate meaningful data reporting in WIN demonstration programs impeded the debates around the Family Support Act because advocates were often unable to do more than raise questions about assertions made about the nature of

259. CALIFORNIA DEP'T OF SOCIAL SERVICES, CALIFORNIA GAIN PROGRAM, ANNUAL REPORT 7 (1988).

260. *See* STATEWIDE GAIN DATA, *supra* note 134, at 25; CALIFORNIA DEP'T OF SOCIAL SERVICES, GAIN QUARTERLY CHARACTERISTICS REPORT 31 (1988).

recipient experiences in WIN and WIN demonstration programs. The debates about the relative effectiveness of alternative approaches are likely to continue for the foreseeable future. In addition to serving as a useful tool for assessing a state's JOBS program, a well-designed system for information collection and evaluation can provide a firm ground for the next round of policy discussions.

CONCLUSION

Since 1981, federal AFDC rules have imposed prohibitively high financial penalties on working AFDC recipients. At the same time, the federal government dramatically reduced its commitment to education and training for AFDC recipients. In the vacuum left by the federal government's absence, a number of states began their own programs for education and training. California's GAIN program is one such state program.

The Family Support Act of 1988 has been described as transforming the AFDC program from an income-support program with a small education and training component to an education and training program with an income-support component. Careful scrutiny of the Act's provisions does not support this impression. The Act leaves essentially untouched the AFDC budgeting rules that make it difficult or impossible for a poor working family to receive income support. Further, the JOBS program — the education and training centerpiece — cannot fairly be viewed as creating a broad and comprehensive structure to assure education and training. Instead, it is a program of limited federal matching funds and enormous state discretion. States are given broad authority to mandate participation, but they are also given substantial flexibility to determine how many people participate and what components they receive. The only measurable fiscal commitment required of states is that they meet steadily increasing participation rates and targeting requirements. The absence of any required fiscal commitment, the lack of minimum standards for education/training components, and the pressure of federal participation rates are likely to lead some states to rely on inexpensive job search and "work" programs, instead of providing some genuine education or training.

California's GAIN program reflects one of the possible set of choices a state might opt for in implementing JOBS. Accordingly, GAIN's operational experience since 1985 offers several important lessons about JOBS implementation.

First, GAIN's experience suggests that a universal program with a substantial education and training component is beyond the fiscal reach of most, if not all, states. A central choice in program development will be whether to limit participants, services, or both. Unless the state's law specifically addresses this issue, the state's decisions about balancing participants and services will be left to the discretion of the state welfare agency or perhaps to the discretion of individual JOBS caseworkers.

Second, in light of limited resources, access to the program becomes a crucial question. How will resources be allocated and to what extent will indi-

viduals have access to the program if they so desire? GAIN does have a priority system, although it does not give priority to volunteers. State systems under JOBS could give a greater priority to volunteers. Preliminary data from GAIN suggests that volunteers are both in need of services and willing to participate at relatively greater intensity levels than others.

GAIN's experience also suggests a number of other points relevant to JOBS implementation: that planning, gradual implementation, and extensive data collection (each of which are permitted but not required in JOBS) are necessary; that formal entitlements to child care are of little value absent a system to effectuate such entitlements; that the fair hearing system is of limited utility in resolving most day-to-day program disputes; and that it is essential for states to develop systems to address disputes that are sufficiently fast, flexible, and responsive. Moreover, GAIN's requirement of a remedial education component prior to vocational training indicates that sequencing services in this way will strictly limit vocational training where access to the training depends on continued AFDC eligibility.

Finally, GAIN's experience suggests that the critical choices in program implementation are not necessarily the ones labelled as options in the federal statute. Rather, the critical choices are the often invisible ones that determine whether "education and training" programs actually result in any education or training. When states initiate programs, the crucial question for recipients will be what they will get from the program. The answer turns largely on the state's willingness to commit resources and on its choices about the breadth and nature of participation. Since the FSA leaves most of these choices to the states, the resulting state decisions will be central to the nature of the recipients' experiences.

Even if states make thoughtful program choices, JOBS will only provide very limited "welfare reform." The Congressional Budget Office projects that 15,000 additional families, out of 3.7 million, will leave AFDC in 1992 through JOBS.[261] Accordingly, we should not expect the AFDC rolls to look very different in 1992. This prediction has two clear implications. First, even with the broadest and most expensive education and training program, recipients will need to rely on AFDC for months or years until they get training and employment. Some recipients, moreover, will remain unemployed either because they are disabled or otherwise unemployable or because jobs are not available for them. Yet the FSA does not address the two basic problems that arise when people require aid: the difficulty of establishing and maintaining procedural eligibility, and the fact that eligible families receive only a fraction of the income needed to live at a subsistence level. A welfare reform approach that defers these problems while addressing JOBS confines the vast majority of recipients to additional years of reliance on a fundamentally flawed system.

Finally, the minimal CBO projections should raise questions about the

261. *See supra* text accompanying notes 152-53.

sufficiency of a strategy which takes the labor market as a given and only addresses the perceived deficits of recipients. The implicit assumption is that everyone can and should obtain employment with some combination of skills upgrading, supportive services, and positive or negative motivation. Yet the CBO projections suggest that only a limited percentage of the caseload will benefit from this direction in the foreseeable future. Moreover, because AFDC benefits are so low, the jobs that make families ineligible for AFDC will often still leave those families deep in poverty. Accordingly, a strategy that does not address the lack of jobs in many communities, the characteristics of low wage jobs, and the continuing income needs of low wage workers will necessarily have limited results.

If the CBO projections are accurate, we can anticipate another round of debates three to five years from now. At that time, there will have been considerable state activity, perhaps without very notable effects on AFDC caseloads. The dispute will then be over interpreting the results. Surely some will claim that the results prove that education and training are not the answer and that only compulsory, punitive programs can affect the behavior of recipients. But the analysis here suggests that some states will not have attempted serious, broad-based education and training programs, nor will they have sought to influence the labor markets which AFDC recipients face.

The foreseeability of this debate highlights the importance of developing sources of data which will provide a clear picture of state activity and about what actually happens to recipients in implementation of JOBS. Otherwise, we run the risk that the experiences of modest programs with limited resources and a range of goals are used to draw broad conclusions about the effectiveness of providing education, training, and child care to the poor.